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CASES CITED

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MISCELLANEOUS CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 560

STATE OF NORTH CAROLINA ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 561

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 548), *State of North Carolina* v. *United States*, is reported in 56 F. Supp. 606.

The report of the Interstate Commerce Commission (R. 69) is reported in 258 I. C. C. 133.

JURISDICTION

The final decree of the District Court was entered on July 22, 1944 (R. 545). The petition for appeal was filed and allowed on August 21, 1944 (R. 575, 583). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a) and under section 238 of the Judicial Code, as amended February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on November 13, 1944 (R. 596).

STATUTES

Pertinent statutory provisions are reproduced in the Appendix, *infra*, pp. 127–130.

QUESTIONS PRESENTED

In a proceeding under section 13 (3) and (4) of the Interstate Commerce Act, the Commission found that the interstate passenger coach fare of 2.2 cents per mile, approved in previous proceedings and in effect on interstate traffic generally on all railroads to and from points in North Carolina, was just and reasonable, and that the intrastate coach fare of 1.65 cents per mile, required by State authority and in effect on the same railroads for similar service in North Carolina,

caused undue prejudice against interstate passengers and unjust discrimination against interstate commerce. By order dated May 8, 1944 (R. 507) the Commission required that the carriers remove this prejudice and discrimination by increasing the 1.65-cent intrastate fare to the interstate level of 2.2 cents. The question presented is the validity of this order. Subordinate questions appear to be as follows:

I. Whether the order is within the Commission's authority.

II. Whether the Commission's findings are supported by the evidence.

III. Whether the Commission granted a full hearing to the State Commission.

IV. Whether the court below erred in refusing to receive certain new evidence which was not a part of the record before the Commission.

V. Whether the Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to bear its fair proportionate share of the aggregate revenue needed to maintain adequate and efficient railway transportation service, is invalid on the ground that the total earnings of the carriers from all their traffic have recently risen to a point deemed by appellants to be in excess of a fair return.

VI. Whether the Commission, in finding that the low intrastate fares operated unjustly to dis-

criminate against interstate commerce, failed to give full consideration to wartime conditions and the stabilization legislation.

STATEMENT

On January 21, 1942, by order (R. 521) in *Increased Railway Rates, Fares, and Charges, 1942,* 248 I. C. C. 545, hereinafter called *Ex Parte 148,* the Commission found that a general increase in passenger fares of 10% would be reasonable and lawful, and authorized such an increase to be made effective by the rail carriers generally throughout the country (R. 72). This increase became effective on interstate traffic February 10, 1942, and resulted in fares of 3.3 cents a mile in Pullman cars throughout the country, of 2.2 cents a mile in coaches in the East (north of the Ohio and Potomac rivers), and also in the West, and of 1.65 cents a mile in the South (east of the Mississippi River). Similar increases were made effective shortly thereafter on intrastate traffic in all states (R. 72, 73).

By an amendatory order of August 1, 1942 (R. 524), in *Ex Parte 148,* upon petition of the southern carriers, the Commission, having previously found that a coach fare of 2 cents plus an increase of 10% would be reasonable for application throughout the country, authorized the southern lines to increase their interstate coach fare from 1.65 to 2.2 cents. These increases became effective October 1, 1942, with the result that the

coach fare throughout the country became uniform at 2.2 cents upon interstate traffic (R. 94). Similar increases were permitted upon intrastate traffic by the commissions of Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina (R. 74, 298). The commissions of North Carolina, Alabama, Kentucky, and Tennessee refused to authorize the increase (R. 74, 298–299). Thereupon the carriers invoked section 13 (3) and (4) of the Interstate Commerce Act. This invocation was the inception of the proceedings before the Commission culminating in the order here under attack, which requires that the intrastate fares in these four states shall be brought up to the interstate level.[1] Separate hearings were held in the four proceedings but they were argued together and are covered by one report (R. 69–103).

The proceeding involving North Carolina was initiated by a petition (R. 121–128) filed in July 1943, by the Atlantic Coast Line Railroad Company, the receivers of the Seaboard Air Line Railway Company, the Southern Railway Company, and other common carriers by railroad engaged in the transportation of persons and property in interstate commerce to, from, and between points in North Carolina, and also in

[1] Appeals from the decree of the District Court for the Western District of Kentucky, sustaining the Commission's order in the Alabama, Kentucky, and Tennessee cases, are before this Court, Nos. 574 and 592, and are assigned for argument immediately following this case.

intrastate commerce within the state. In response to this petition the Commission, in October 1943, ordered the investigation (R. 141-2), naming the interested carriers as respondents, to determine whether the relation between the interstate and intrastate coach fares caused violations of section 13 (3) and (4) and, if so, what fares should be prescribed to correct the violations.

Hearing was held in December 1943. The carriers, the state commission, the Federal Price Administrator, and certain other parties appeared and presented evidence (R. 143-409). Briefs were filed and the issues were orally argued before the Commission. On March 25, 1944, the Commission rendered its report (R. 69-103), deciding this case and the three cognate cases. *Alabama Intrastate Fares*, 258 I. C. C. 133. The report makes full and adequate findings of fact, summarized below, and reaches the conclusion that the disparity between the interstate and intrastate fares causes undue preference and prejudice and unjust discrimination in violation of section 13 (3) and (4). In the subsequently issued order, dated May 8, 1944 (R. 507), which is the order here challenged, the Commission required this unlawfulness to be corrected by increase of the intrastate fares to the interstate level.

Genesis of Disparity

Certain of the basic facts, shown by the evidence and found in the Commission's report,

which explain the genesis of the disparity between the interstate and the intrastate fares in question, may be briefly stated.

In *Increased Rates, 1920*, 58 I. C. C. 220, responsive to the new regulatory policy adopted by Transportation Act, 1920, the Commission authorized, besides varying increases in freight rates, a country-wide increase in passenger fares of 20% plus a Pullman surcharge. Thereby the interstate fare of 3 cents a mile then in effect throughout the country became 3.6 cents in coaches and 3.6 cents plus the surcharge in sleeping and parlor cars (R. 71, 294, 295; 214 I. C. C. 174, 186).

Most of the state commissions authorized similar intrastate increases. A few declined to do so, and in subsequent proceedings under section 13 the Commission required the increases. See, e. g., 59 I. C. C. 391, order sustained, *Wisconsin R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; 59 I. C. C. 290, ordered sustained, *New York* v. *United States*, 257 U. S. 591. Thus, these fares became effective on both interstate and intrastate traffic throughout the United States.

These increased fares remained in effect for 13 years. During this period there was a marked decline in passenger traffic. In 1933, the decline, compared with 1923, was 58% in the East, 63.5% in the South, 66% in the West (214 I. C. C. 174, 178). Newly constructed hard-surfaced highways gridironed the country, bus transportation ap-

peared nearly everywhere, and millions of private automobiles were purchased. These developments were largely responsible for the decline in railway travel (R. 71).

In the South numerous efforts were made by the carriers to check the drastic decline, but without success. Then several of the carriers began to experiment with reduced fares between particular points. By December 1, 1933, the reductions had become general. Effective on that date, most of the southern lines reduced the fares in Pullmans to 3 cents a mile, eliminated the surcharges, and lowered the coach fare to 1.5 cents a mile (R. 72, 296; 214 I. C. C. 174, 187).[2] These reductions were made effective on interstate and intrastate traffic alike by the voluntary action of the carriers; they were not prescribed in any instance by either federal or state authority. On the same date the railroads west of the Mississippi also eliminated the surcharges and reduced their basic fares to 3 cents in Pullmans and 2 cents in coaches (214 I. C. C. 201).

In the East the fares remained on the 1920 bases until 1936. In that year, after a comprehensive country-wide investigation, the Commission determined that just and reasonable basic fares would be 3 cents a mile in Pullmans, with-

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[2] This discussion, for brevity, deals only with one-way fares, which are typical, neglecting changes in round-trip fares. The details are given in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 188–201.

out any surcharge, and 2 cents a mile in coaches. *Passenger Fares and Surcharges,* 214 I. C. C. 174.

These basic fares, which, after the 1936 order, were generally 3 cents a mile in Pullmans throughout the country, 2 cents in coaches in the East and West, and 1.5 cents in coaches in the South (~~214~~ 248 I. C. C. 545, 564), remained in effect until February 10, 1942, when they were increased 10% under the authorization of *Ex Parte 148.*

The proceeding in *Ex Parte 148* was initiated in December 1941 shortly after Pearl Harbor, by petition of the rail carriers of the country for authority to increase both their freight rates and passenger fares 10%. They pointed to substantial increases in operating costs which threatened to impair their financial resources and their ability to render adequate and efficient transportation service. Increases in wages aggregating $311,711,000 per year, resulting from mediation agreements, had become effective. Other wage increases would total $20,000,000 annually. Prices of materials and supplies had increased. Upon recommendation of the War Department, the railways were taking precautionary measures to safeguard their properties and operations during the war, adding costs of approximately $30,000,000 a year. They were being called upon frequently, in connection with the transportation of troops and property for the United States,

to perform many special and unusual services, which further added to their costs (248 I. C. C., 551, 607, 609, 613).

The investigation in *Ex Parte 148* was completed January 14, 1942, following extensive hearings. The Commission quickly reached the conclusion that the 10% increase in passenger fares should be approved. On January 21 it issued an order (R. 521–523) finding the proposed increase in fares to be necessary to meet increased operating expenses resulting from increases in wages and in the cost of materials and supplies, and from additional expenditures to safeguard carrier properties and operations during the emergency, that the proposed increase in fares was necessary to enable the carriers to continue to render adequate and efficient transportation service during the emergency, and that the proposed increased fares would be reasonable and lawful.

On March 2, 1942, the Commission issued its report in that investigation, *supra*, finding, as to freight rates, that increases ranging up to 6% were warranted, and affirming the previous findings regarding passenger fares, noting that the increased fares had been made effectively generally on interstate traffic February 10, 1942 (p. 566).[3] On vari-

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[3] The report is devoted largely to freight rates. Reference to passenger fares is made on pp. 549, 550, 564–566, and in the "Conclusions and Findings," pp. 606–613.

A copy of the order of January 21, 1942, in *Ex Parte 148* was introduced in evidence in the court below. (R. 120, 521–

ous subsequent dates these increased fares also became effective on intrastate traffic in al states (R. 73).

Had the coach fares in southern territory then been on the normal basis of 2 cents prevailing elsewhere in the country, this increase would have raised them to 2.2 cents. But the low 1.5-cent fares were still in effect and the 10% increase lifted them only to 1.65 cents. On July 14, 1942, the southern carriers petitioned the Commission for the necessary authority to increase coach fares to the 2.2-cent basis (R. 297). The Commission, having found in *Passenger Fares and Surcharges, supra,* that 2 cents was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines in southern territory, by order of August 1, 1942 (R. 524), authorized the southern carriers to apply the increase of 10% approved in *Ex Parte 148* to a basic fare of 2 cents, and modified accordingly the original order in *Ex parte 148*.

523.) Copies of the reports of March 2, 1942, 248 I. C. C. 545, April 6, 1943, 255 I. C. C. 357, November 8, 1943, 256 I. C. C. 502, May 12, 1944, 258 I. C. C. 455, in *Ex Parte 148*, and the report of February 28, 1936, in *Passenger Fares and Surcharges*, 214 I. C. C. 174, were furnished to the court below (R. 119–120), as these reports form a significant part of the background of this case, but they were not introduced as evidence, because of course the courts take judicial notice of the published reports of the Commission. Since then the Commission has issued a further report in *Ex Parte 148*, dated December 12, 1944, 259 I. C. C. 159, to which attention is invited.

As stated above, the southern carriers established the 2.2-cent fare on interstate traffic effective October 1, 1942, with the result that the coach fare became uniform at 2.2 cents upon interstate traffic throughout the country. Thereupon the southern carriers undertook to establish the same coach fare upon intrastate traffic in the various southern states, and, as we have seen, they were permitted to do so by the state commissions of Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina (R. 74, 298). The carriers' application to the North Carolina commission for such authority was filed October 12, 1942 (R. 124). By report and order of July 8, 1943 (R. 128–140) that commission withheld authorization of the increase, and, as an increase in intrastate fares in North Carolina may not lawfully be made without the consent of the state commission (R. 298), the 1.65-cent fares were necessarily kept in effect in that state. Fares at this level also remained in effect intrastate in Alabama, Kentucky, and Tennessee, due to the refusal of the state commissions to approve increases to the interstate level.

The result of these diverse actions was that the 2.2-cent coach fare was made effective throughout the United States on interstate traffic and in 44 of the 48 states on intrastate traffic. In other words, it was made effective everywhere in the country except intrastate in North Carolina, Alabama, Tennessee, and Kentucky.

On July 22, 1943, the North Carolina carriers filed the aforesaid petition with the Interstate Commerce Commission, invoking section 13 of the Interstate Commerce Act. The resulting order does no more than to require the intrastate fares in North Carolina (and in Alabama, Tennessee, and Kentucky) to be brought up to the level in effect elsewhere throughout the United States.

Summary of Commission's Findings

Section 13 (4), forbidding "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," as construed by this Court, inhibits two distinct types of discrimination growing out of disparities between interstate and intrastate rates: First, undue prejudice against interstate passengers, shippers, or localities; second, unjust discrimination against interstate commerce resulting from the failure of the intrastate rates to bear their fair proportionate share of the revenue required to maintain adequate national railway transportation service. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *Florida* v. *United States*, 282 U. S. 194; *Georgia Comm.* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70; *Florida*

v. *United States*, 292 U. S. 1; *Ohio* v. *United States*, 292 U. S. 498.

The Commission here found the existence of both these kinds of prejudice or discrimination; it found that there was undue preference of intrastate passengers and undue prejudice against interstate passengers, and also that the revenue deficiencies resulting from the low intrastate fares caused unjust discrimination against interstate commerce.

The report is replete with basic findings of fact, which lead to and support six ultimate findings or conclusions (R. 95–96), which are here summarized.

In determining the question presented, the Commission first considered the reasonableness of the interstate fares. After reviewing the history of rail fares since 1908 (R. 71), and considering in detail various facts and circumstances affecting the level of the interstate fares, particularly in the South (R. 74–82), it made the ultimate finding (R. 95) that:

> 1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to,

from, and through points in Alabama and Tennessee, are just and reasonable.[4]

The Commission then considered the relation of the interstate and intrastate fares (R. 82–85), and found the existence of the disparity:

> 2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certains exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding (R. 95).

Having found the interstate fares to be just and reasonable, thus establishing a proper standard of comparison, and having found a disparity between the intrastate fares and *corresponding* interstate fares, the next question for consideration was whether there were differences in

[4] The carriers' petition to the Commission in the North Carolina case brought in issue the round-trip intrastate fares in coaches as well as the one-way intrastate coach fares. The intrastate round-trip coach fares were 1.485 cents a mile, return limit 15 days; the interstate round-trip coach fare, return limit three months, was 1.98 cents a mile. (R. 82, 84.) That petition did not, however, bring in issue the intrastate fares in Pullmans, either one-way or round-trip, as they were then the same as those applying interstate. (R. 84.)

transportation conditions which warranted the disparity. It was found that the carriers in North Carolina, Alabama, Tennessee, and Kentucky are engaged in the transportation of both interstate and intrastate passengers, and that such passengers "are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances" (R. 85).

It was found that this condition prevailed throughout the four States involved. "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States. The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide * * *" (R. 94).

These basic findings of fact lend full support to the ultimate findings of similarity of transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers:

3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States,

and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from and through those respective States on the other, are substantially similar (R. 95).

4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers (R. 95).

The Commission then found the existence of the second type of discrimination declared unlawful in section 13. This ultimate finding, supported by appropriate underlying findings (R. 86–87), reads (R. 95–96):

5. Respondents' revenues under the lower intrastate fares are less by at least \$725,000 per annum in Alabama, \$500,000 in Kentucky, \$525,000 in North Carolina, and \$525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares * * *"

After thus finding substantial revenue losses, due to the low intrastate fares, the Commission found (part of finding No. 5) that—

> traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.

The preceding findings led to the following conclusions:

> 6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce; * * * (R. 96).

This finding also specified the manner in which these discriminations should be removed—"by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by repondents to, from, and through such States * * *" (R. 96).

Order not entered until after state authorities were afforded opportunity to correct discriminations found. The Commission refrained

from issuing an order contemporaneously with the report, and left "to respondents and the respective State Commissions the matter of adjusting the intrastate fares" to conform to the findings (R. 96) Cf. *Wisconsin R. Comm. v. C., B. & Q. R. Co.*, 257 U. S. 563, 590–591. The state authorities refused to give their consent to such action (R. 489–490). It was not until then that the Commission made the order here in question, dated May 8, 1944 (R. 507). (The same order made a similar requirement respecting the intrastate fares in Alabama, Kentucky, and Tennessee.) On the same date the Commission denied petitions for rehearing (R. 508–509).

Proceedings in court below. Suit to enjoin the order was filed by the state authorities in June 1944. The Economic Stabilization Director by the Price Administrator, and certain others, intervened in support of the petition. The affected rail carriers intervened in defense of the order. The original effective date of the order, July 1, 1944, was postponed by the Commission at the request of the court until August 1, 1944 (R. 509). Hearing before the court of three judges on submission for final decree (R. 111) was held July 12, 1944 (R. 110–121). The opinion of the court, by Circuit Judge Parker, rendered July 22, 1944 (R. 548), accompanied by findings of fact and conclusions of law (R. 546–547) sustained the Commission's order. Final decree dismissing the

bill (R. 545) was entered on the same day. The appeal to this Court followed.

The increased fares were made effective August 1, 1944, and have since remained in force.

The United States at first filed an answer defending the order (R. 103) but later filed an amended answer (R. 106), taking a neutral position on the ground that two other governmental agencies, the Office of Price Administration and the Interstate Commerce Commission, were aligned in opposition; and it did not participate in the proceedings before the District Court.

SUMMARY OF ARGUMENT

I. The order, requiring removal of discrimination against interstate passengers and interstate commerce, is within the authority conferred by section 13 (3) and (4) of the Interstate Commerce Act. *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Louisiana Commission* v. *United States*, 284 U. S. 125; *Illinois Commerce Comm.* v. *U. S.*, 292 U. S. 474. It has long been established that the Commission, under these provisions, has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue prejudice or discrimination to interstate commerce resulting from the maintenance of the intrastate rate. *Illinois Comm.* v. *Thomson*, 318 U. S. 675, 682. The *Wisconsin* decision recognizes that the Commis-

sion is authorized to remove either unjust discrimination against interstate commerce resulting from revenue losses caused by the intrastate rate or undue prejudice against interstate shippers or passengers. Subsequent decisions make it clear that a valid finding of either of these kinds of discrimination is sufficient to support a corrective order. *Florida* v. *United States*, 282 U. S. 194; *Florida* v. *United States*, 292 U. S. 1; *Georgia Comm.* v. *United States*, 283 U. S. 765; *Ohio* v. *United States*, 292 U. S. 498; *United States* v. *Louisiana*, 290 U. S. 70.

II. Substantial evidence supports the order and the findings, upon which it rests, of the existence throughout the State of both types of discrimination forbidden by section 13. The Commission's report reflects the evidence in condensed form, and, as it is not contended that any of the facts found were without support in the evidence, primary resort may be had to the report itself to determine the nature and scope of the evidence. Some of the evidence supporting each of the six major findings, except the second finding which is not challenged, with appropriate record references, is stated in section II hereof, *infra*, page 39. As has been previously mentioned, the reports of the Commission in *Passenger Fares and Surcharges*, *supra*, and the five reports in *Ex Parte 78*, previously cited, form the background of the case.

That the evidence supports the Commission's finding of the reasonableness of the interstate coach fares of 2.2 cents can hardly be doubted That fare is lower than the coach fare of 3 cents which prevailed throughout the country during World War I, lower than the coach fare of 2.5 cents which applied throughout the country for 10 years prior to World War I, and substantially lower than the coach fare of 3.6 cents in effect throughout the country for at least 13 years after August 26, 1920.

The evidence showed changes in conditions subsequent to the Commission's finding in 1936 that coach fares of 2 cents would be reasonable for application throughout the country, including southern territory, which tended, independently of the evidence and findings in *Ex Parte 148* to support the reasonableness of the increased fare of 2.2 cents.

As evidence of the greatest probative value in determining reasonableness of rates or fares is comparison with other rates or fares for like services (Report, R. 82), the most cogentevidence supporting the finding of reasonableness of the 2.2-cent coach fare is that, prior to the order here involved, coach fares of 2.2 cents had been made effective on interstate traffic throughout the country, with the approval and under the authorizations of the Commission, and that the same fare had also been made effective on inrastate traffic

in all States other than the four involved in these proceedings.

The finding of undue preference and prejudice on a state-wide scale rests upon evidence showing similarity of transportation conditions affecting the interstate and intrastate traffic. In the operation of trains into, out of, across, and within the State, no consideration is given to state lines and no distinction is made between interstate and intrastate passengers. Both classes of passengers travel in the same trains and in the same cars, irrespective of the interstate or intrastate nature of the travel. No trains are operated wholly for intrastate passengers. The interstate and intrastate passengers travel on the same trains and receive the same service but the interstate passengers paid 2.2 cents a mile while the intrastate passengers were required to pay only 1.65 cents a mile. The evidence gave numerous instances of such commingling of interstate and intrastate passengers and the payment of a less fare by the one class than by the other under substantially similar, if not identical, circumstances.

Nothing in the physical operating conditions in North Carolina warrants this difference in fares, for the conditions there are substantially the same as those in adjoining states and throughout southern territory. Nor was this difference in fare justified by differences in service accorded, as the interstate and intrastate passengers were

carried on the same trains and accorded similar service.

The evidence as to the state-wide character of the preference and prejudice was not controverted. Some of the carriers operate streamlined coach trains, giving service superior to that in ordinary coaches, and on some branch lines the passenger service is comparatively inferior, but, as stated by Circuit Judge Parker, intrastate passengers travel on the streamlined trains and interstate passengers travel on the branch lines. The great bulk of the passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. (Opinion below, R. 567–8.)

The evidence, comprehensive and typical in character, was ample to support the Commission's finding of similarity of interstate and intrastate transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers on all trains operated by these interstate carriers in North Carolina. Cf. *Georgia Comm.* v. *United States*, 283 U. S. 765, 774; *United States* v. *Louisiana*, 290 U. S. 70, 75, 76.

The finding regarding the revenue losses resulting from the maintenance of the subnormal intra-

state fare of 1.65 cents rests upon evidence of audits of tickets or cash fares actually collected from intrastate passengers during various periods, and upon evidence showing that if these passengers had been carried at the fare of 2.2 cents prevailing for interstate passengers on the same trains, the aggregate revenues would have been increased by substantial amounts. There was also evidence that the increase of the intrastate fare to the interstate level would not discourage patronage and would produce increased revenues, aggregating at least $25,000 annually upon North Carolina intrastate passenger traffic.

The evidence as a whole amply sustains all the Commission's basic findings and gives full support to the ultimate finding of the existence, state-wide in scope, of both types of discrimination forbidden by section 13.

The Commission did not err in considering past deficits from passenger traffic. The expression in *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 590, relied upon by appellants, does not prevent the Commission from considering carrier revenues over a period of years.

The evidence established that the intrastate fare, in its relation to the interstate rate found reasonable by the Commission, was unreasonably low. Cf. *Illinois Comm.* v. *United States*, 292 U. S. 474, 483. In a case of this kind the ques-

tion is not whether the intrastate rate is compensatory or confiscatory but whether it causes the forbidden discriminations. The Commission's report and order negative the possibility that a passenger fare of 1.65 cents is now within the zone of reasonableness.

Section 13 (3) explicitly authorizes carriers subject to the act to file petitions with the Commission bringing in issue rates or fares imposed by state authority. No petition, complaint, or evidence by anyone else is required. These provisions permit interstate carriers to show that their intrastate rates, imposed by state authority, cause undue prejudice against interstate passengers, as well as unjust discrimination against interstate commerce. In this respect, section 13 is different from section 3 (1), and its purpose is different. The latter provides protection for individuals, localities, etc., against undue prejudice practiced by the carriers, while section 13 affords a means of relief for carriers against unduly low rates or fares imposed by state authority. The evidence before the Commission plainly shows the existence of undue prejudice against interstate passengers and the resulting injury. This was enough.

III. The Commission accorded the North Carolina commission a full hearing. Appellants' contentions to the contrary are not well taken.

IV. The court below properly held that evidence *de novo* was not admissible.

V. The Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to contribute its fair share of the revenues required for maintenance of adequate and efficient transportation service, is not invalid on the alleged ground that the earnings of the carriers from all their traffic have recently risen to a level deemed by appellants to be in excess of a fair return. In determining whether an intrastate rate which is lower than the reasonable interstate rate for comparable service causes unjust revenue discrimination against interstate commerce, the question is not whether the entire traffic of the carriers involved is earning enough for the maintenance of adequate transportation service but whether the particular intrastate traffic is contributing its fair proportionate share of the revenue needed for this purpose. Decisions of this Court in the *Wisconsin* and other cases make it clear that intrastate traffic is not contributing its fair share of the revenue where the corresponding interstate rates have been found by the Commission to be reasonable, where the intrastate rates are lower than such reasonable interstate rates, where the transportation conditions affecting the interstate and intrastate traffic are substantially similar, and where increase of the intrastate rates will produce increased revenues. Under these decisions and subsequent amendments to the Interstate Commerce Act, failure of intrastate traffic

to contribute its fair share of the revenues needed for maintenance of adequate and efficient transportation service may be found by the Commission to be an unjust discrimination against interstate commerce whether the general earnings of the carriers are low or, during a temporary period of extraordinary traffic volume, are above normal. "Congress as the dominant controller of interstate commerce may * * * restrain undue limitation on the earning power of the interestate commerce system in doing state work * * *" *Wisconsin* case, p. 590. If the railways are to earn sufficient revenue to provide adequate and efficient railway transportation service, the lower the intrastate rates the higher the interstate rates may have to be. Though the original section 15a as enacted in 1920 was amended in 1933 so as to abandon the "group method" of rate making, contemplating the fixing of rates so as to produce a fair return upon value for the carriers as a whole or in groups and to repeal the accompanying provision for recapture of earnings in excess of a fair return, the "dovetail relation" between section 15a and section 13 (4) was not disrupted and continues under the amended section 15a. *Florida* v. *United States*, 292 U. S. 1.

Decisions of this Court lend no support to appellant's contention that intrastate traffic may avoid contributing its fair proportionate share of

the needed over-all revenue when the general revenues have risen above a certain level. On the contrary, they recognize that where the intrastate traffic does not bear its fair share of the general burden, there is inevitably a discrimination against interstate commerce whether the general revenues from all traffic are high or low.

If the state commissions could refuse to bring intrastate rates up to the reasonable interstate level or could require reductions in intrastate rates below that level, on the ground that the interstate transportation system is earning what might be deemed by the state commissions to be more than a fair return, the result might be, if Federal authority were impotent to prevent it, the reduction of the general revenues of the carriers as a whole to such an extent as to require a general increase in interstate rates or fares or to prevent a general reduction in interstate rates or fares. See *Colorado* v. *United States*, 271 U. S. 153, 163

Decisions of this Court have construed section 13 as requiring that the intrastate traffic of the country, which constitutes an important part of the entire traffic, shall bear its fair proportionate share of the revenues needed to maintain an adequate national transportation system and that its fair proportionate share is that contributed by rates found by the Commission to be reasonable and sufficient to yield revenue meeting the tests

of section 15a and the National Transportation Policy.

The fallacy of the Price Administrator's argument lies in its assumption that the law sets "fair return" as the inexorable peak above which railway income shall never rise. The argument overlooks that the "fair return" method of rate making was repealed in 1933 along with the recapture clause, and that the new standard leaves it to the administrative judgment of the Commission to prescribe rates to yield sufficient revenue to enable the carriers to provide adequate and efficient railway transportation service.

To limit railway income, during a temporary period of heavy war traffic, to some indefinite level that might be deemed to be a fair return under present conditions, though the law does not now fix a fair return, would restore the most objectionable feature of the old section 15a, which provided for recapture of excess earnings in any year, regardless of previous or possible future deficits.

By the provisions of the amended section 15a and of the National Transportation Policy, responsibility of determining the revenue needs of the interstate railway system has been placed upon the Commission. The Commission has performed this duty. At short intervals during the war period it has carefully inquired into carrier revenues. *Ex Parte 148,* 248 I. C. C. 545, 255

I. C. C. 357, 256 I. C. C. 502, 258 I. C. C. 455, 259 I. C. C. 159. After granting freight rate increases ranging up to 6% and passenger fare increases of 10%, in the first report rendered shortly after Pearl Harbor, it suspended all the freight rate increases about a year later, until December 31, 1943, and in subsequent reports has further suspended them from time to time until the end of 1945, but has not disturbed the passenger fare increase. In each of the subsequent surveys it has found no occasion to change these rate levels, finding that these rates meet the objectives of the National Transportation Policy as defined in the Interstate Commerce Act and the standards of section 15a (2) of the Act, and are reasonable and just.

The rates of return of the carriers involved, as indicated by evidence of record taken in December 1943, are not unduly high measured by the discarded standard of fair return fixed under the repealed provisions of section 15a.

VI. In finding that the low intrastate fares operated to discriminate against interstate commerce, the Commission did not fail to give full consideration to wartime conditions and the stabilization legislation. It is established by *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 114, *Vinson* v. *Washington Gas Co.,* 321 U. S. 489, and *I. C. C.* v. *Jersey City,* 322 U. S. 503, that the price control legislation withheld authority from the

Price Administrator to control the rates of common carriers already subject to Federal regulation, and that the only change that legislation made in the Interstate Commerce Act was the provision requiring notice to the designated agency and consent to its intervention. These requirements were complied with in each of these four section 13 cases (R. 92). Under *I. C. C.* v. *Jersey City, supra*, the weight of the Price Administrator's contentions is for the Commission, not the court. As demonstrated by its report in this case, the Commission gave full consideration to the contentions of the Price Administrator, and recognized its duty to consider the anti-inflation legislation. The Commission considered the Price Administrator's contention to the effect that to raise the subnormal intrastate fare of 1.65 cents to the 2.2-cent level prevailing interstate throughout the country and intrastate in 44 of the 48 states, in order to remove undue prejudice and unjust discrimination against interstate commerce, would be inconsistent with the wartime stabilization program, and, as shown by its ultimate findings, overruled the contention, citing its report in *Increases in Texas Rates, Fares and Charges*, 253 I. C. C. 723, dealing with section 13 situations precisely similar in principle to the present cases. The last-mentioned report is cited with approval in *I. C. C.* v. *Jersey City*, 322 U. S., pp. 520–521, footnote 8. The effect of the Commission's de-

cisions in the *Texas* case and in the present case is that an increase in intrastate fares in a particular state or states to the level prevailing generally on interstate commerce throughout the country and on intrastate traffic in most of the states of the Union does no violence to the purpose of the price control and stabilization program. It is significant that in its latest report in *Ex Parte 148*, 259 I. C. C. 159, 189, the Commission found that, "Nothing in the record shows that the 10 percent increase in passenger fares has had any inflationary effect."

ARGUMENT

I

The order, requiring removal of discriminations against interstate passengers and interstate commerce, is within the authority conferred by section 13 of the Interstate Commerce Act

Section 13 (3) specifically authorizes carriers by railroad subject to the Act to file a petition with the Commission bringing in issue any rate or fare "made or imposed by authority of any state,"[5] and authorizes the Commission to institute an investigation upon such petition. Paragraph 4 declares unlawful any such rate or fare which unduly or unjustly discriminates either against interstate shippers, passengers, or localities or against inter-

[5] There is no dispute that the intrastate coach fare of 1.65 cents was imposed by State authority. Cf. *Florida* v. *U. S.*, 282 U. S. 194, 209–210.

state commerce; and it directs that whenever, in any such investigation, the Commission, after full hearing, finds that either of the forbidden discriminations exist, it "shall" prescribe the rate or fare which will, in its judgment, remove the discrimination.

These provisions, added by Transportation Act, 1920, first came under review in *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563 (1922) in which, in an opinion by Chief Justice Taft, they were interpreted and their constitutionality sustained. It was held that the principles laid down in the *Minnesota Rate Cases*, 230 U. S. 352, 432, 433, in the *Shreveport* case, 234 U. S. 342, 351, and in the analogous cited cases, left no room for discussion of the constitutionality of section 13.

The order there reviewed, like the present order, required the increase of intrastate passenger fares to the interstate level previously fixed as reasonable. The Court fully sustained the Commission's authority under section 13 to remove undue discrimination against travellers in interstate commerce caused by the lower intrastate rates, but was unable to find that the evidence relating to discrimination of that character was sufficiently comprehensive in scope to support the Commission's state-wide order. It rested its decision, sustaining the order, upon the Commission's finding of unjust discrimination against

interstate commerce resulting from the revenue losses caused by the low intrastate fares. The Court overruled the contention that the words "unjust discrimination against interstate commerce," as used in section 13, meant only discrimination as between persons and localities. It held that those words were not tautological of the preceding words forbidding undue preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and that they "aptly include a kind of discrimination against interstate commerce which the operation of" the Transportation Act, 1920 "for the first time makes important and which would seriously obstruct its chief purpose" to develop and maintain an adequate national railway transportation service. Thus, the *Wisconsin* decision recognizes that the Commission is authorized by section 13 to remove either unjust discrimination against interstate commerce resulting from intrastate revenue losses or undue prejudice against interstate shippers or travellers. Subsequent decisions make it clear that a valid finding of either of these kinds of discrimination is sufficient to support a corrective order.

In *Florida* v. *United States*, 282 U. S. 194, the Court, through Chief Justice Hughes, held that in the exercise of its power to authorize the Interstate Commerce Commission to establish intra-

state rates in order to remove unjust discrimination against interstate commerce, "the Congress has given to the Commission authority not only to remove an undue prejudice against persons or localities, but to establish a state-wide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute." Differentiating the two types of discrimination, the decision explains that, "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenues, the question is that of the relation of rates to income" (*Ib.*, 214).

In the second decision in the *Florida* case, 292 U. S. 1, 5, Chief Justice Hughes pointed out that in the *Wisconsin* case the Court reached the conclusion that the provision of section 13 (4) for the removal of "any undue, unreasonable, or unjust discrimination against interstate commerce" was not to be regarded as referring only to discrimination as between persons and localities. "We held that Transportation Act, 1920, imposed an affirmative duty on the Commission 'to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.' Intrastate rates, we said,

must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an 'unjust discrimination against interstate commerce.'" This was said in sustaining an order which required increases in intrastate log rates throughout the State of Florida so as to bring them up to the reasonable interstate level, based solely upon a finding of revenue discrimination. The opinion states (pp. 3-4) that the Commission "found that the * * * intrastate rates caused unjust discrimination against interstate commerce from a revenue standpoint," but "made no finding with respect to undue prejudice against persons and localities in interstate commerce." See also the opinions of Mr. Chief Justice Stone in *United States* v. *Louisiana*, 290 U. S. 70, and *Illinois Comm.* v. *U. S.*, 292 U. S. 474, 482, and the opinion of Mr. Justice Brandeis in *Georgia Commission* v. *United States*, 283 U. S. 765, 773.

In *Ohio* v. *United States*, 292 U. S. 498, in which the Commission had found both types of discrimination, this Court, speaking through Mr. Justice Roberts, said:

> The District Court held the order justified by reason of undue preference and

prejudice, but did not pass upon the lawfulness of the Commission's action in respect of revenue discrimination. We hold the decision of the court was right and we need not discuss the argument presented as to revenue burden (pp. 501–502).

In *Illinois Commission* v. *Thomson*, 318 U. S. 675, Mr. Chief Justice Stone said that "It has long been established that the Interstate Commerce Commission, under section 13 (4) of the Act has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue or unreasonable prejudice to interstate commerce resulting from the maintenance of the intrastate rate" (P. 682). And it was there pointed out that "the Commission alone is authorized to wield the constitutional power to set aside state-established intrastate rates by prescribing intrastate rates itself * * *."

In view of the above cited decisions, and others sustaining section 13 orders, including *New York* v. *United States*, 257 U. S. 591; *Louisiana Commission* v. *United States*, 284 U. S. 125, and *Mississippi* v. *United States*, 307 U. S. 610, it is hardly open to question that an order such as the one here involved, supported by findings of both types of discrimination forbidden by section 13, is within the Commission's authority, and that a valid finding of either of these types of discrim-

ination will sustain such an order. See also *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–120, and *Wickard* v. *Filburn*, 317 U. S. 111, 118–129.

II

The order is supported by substantial evidence showing the existence throughout the State of both types of discrimination forbidden by Section 13

Appellants allege that neither the Commission's order nor five of the six major findings upon which it rests are supported by the evidence (R. 576–7). The finding (No. 2, R. 95) that the intrastate fares in North Carolina are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in North Carolina, Alabama, Kentucky, and Tennessee, is not attacked. Evidence was first submitted by the carriers, who, though technically respondents, were in fact complainants, and they assumed the burden of proving the allegations of their petition. Then the North Carolina Commission introduced evidence, and, finally, evidence was submitted by the Office of Price Administration. Fifteen witnesses testified (R. 151–295), and introduced 21 exhibits (R. 295–408A). Certain other documents were incorporated into the record by reference (R. 145–148) or by stipulation at the oral argument (R. 410–411). Some of the evidence supporting the five challenged findings is here stated.

Reasonableness of interstate fares

The evidence bearing on the reasonableness of the coach fare of 2.2 cents, made effective on interstate traffic throughout the South on October 1, 1942, showed, among other things, that this fare is substantially lower than that which prevailed in that territory and generally throughout the country for 25 years prior to the inauguration in the South of the experimental coach fare of 1.5 cents on December 1, 1933:

For ten years prior to World War I the fares were generally 2.5 cents a mile. On June 10, 1918, while the railroads were under Federal control, the 2.5-cent fare was increased to 3 cents by order of the Director General of Railroads. Effective August 26, 1920, the 3-cent fare was increased to 3.6 cents, under the authorization of *Increased Rates, 1920, supra.* The 2.5-cent fare was 13.6% higher than the 2.2-cent fare; the 3-cent fare was 36.4% higher, and the 3.6-cent fare, which remained in effect in southern territory for 13 years, was 63.6% higher (R. 71–74; 295–300).

There was also evidence showing changes in conditions subsequent to the Commission's finding in 1936 that fares of 2 cents in coaches would be reasonable, which tended, independently of the evidence and findings in *Ex Parte 148,* to support the reasonableness of the increase in that fare to 2.2 cents. It was shown that large expenditures had been made by the carriers in remodeling and

air-conditioning passenger equipment (R. 79, 302–303); that expenses had increased because of the expansion in the volume of passenger traffic (R. 153, 158, 164, 174, 305); that unusual expenses had resulted from wartime operations, including expedited movement of troop trains (R. 79–80, 153, 159–161, 302, 303), and that there had been recent increases in wages (R. 159, 163–164, 211, 332), in the cost of materials and supplies (R. 80, 159, 211, 332), and in taxes (R. 80–81, 210–211, 330–331). Deficits from passenger operations in the years 1936–1942 were also shown (R. 76–78, 202–203, 318).

The most cogent of the evidence on this subject, however, is that showing that coach fares on the 2.2-cent basis were contemporaneously in effect on interstate traffic throughout the country and on intrastate traffic in 44 states, and that these fares had been previously found by the Commission to be reasonable. (R. 82, 94, 298, 299, 300) Cf. *Louis. & Nash. R. Co.* v. *U. S.,* 238 U. S 1, 15–16.

The previous finding of the reasonableness of these fares were made in *Passenger Fares and Surcharges, supra,* and in the first and second reports in *Ex Parte 148.* As stated above, after a comprehensive investigation of passenger fares throughout the country, the Commission found in *Passenger Fares and Surcharges* that fares of 3 cents in Pullmans and 2 cents in coaches would be reasonable for the future and prescribed these

fares as maxima. It did not prescribe them as minima, hence the railroads were at liberty to initiate or maintain lower fares, and the Commission found that the voluntarily established experimental coach fare of 1.5 cents then in effect in southern territory was not unreasonable or otherwise unlawful. It did not require the southern carriers to raise that fare, though it did find that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the southern lines. (R. 73; 214 I. C. C., 256). In its report in the case at bar the Commission characterized the 1.5-cent fare as "a *subnormal* fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles" (R. 74). [Italics supplied.]

In its original order in *Ex Parte 148*, as previously shown, the Commission found that a Nation-wide increase of 10% in fares was necessary to enable the carriers to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise lawful.

This latter finding, coupled with the finding in *Passenger Fares and Surcharges* that 2 cents was a reasonable basic coach fare for application generally, including southern territory, constituted a finding that 2.2 cents would be a reasonable coach fare in the South. (Hence, the

Commission's order of August 1, 1942 (R. 524), which authorized the southern carriers to apply the increase of 10% approved in *Ex Parte 148* to a basic fare of 2 cents, did nothing more than to permit those carriers to increase their subnormal fare to the normal basis.)

After the *Ex Parte 148* increases had been in effect for a little over a year, the Commission, upon the petition of the Price Administrator and others, reopened the proceeding and, on April 6, 1943, after extensive further hearings, issued a supplemental report, 255 I. C. C. 357, in which it again considered the reasonableness of the passenger fares throughout the country. This report, like the original report, surveyed the revenue needs of the interstate railway transportation system of the country in time of war.[6] In respect of the freight rate increases, ranging up to 6%, the Commission found that the added revenue was not necessary or justified under the conditions then prevailing, p. 394, and it suspended the previous authorization as to freight rate increases until December 31, 1943. Regarding passenger fares, it found the situation to be different in important respects, and stated (p 394):

> * * * As we have previously shown [pp. 385–389] the evidence herein discloses

[6] As in the case of the original report, this supplemental report is devoted largely to the more important subject of freight rates. Reference to passenger revenues and fares will be found on pp. 367–368, 385–388, and 394–395.

that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated * * *

Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the surcharges that became effective in that year. Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I * * *

Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel * * *

It concluded and found that no modification of the previous findings respecting the interstate standard (as distinguished from commutation) passenger fares was necessary (P. 395). The

report noted that on October 1, 1942, the basic coach fare on most of the southern roads was increased from 1.5 cents to the maximum of 2 cents found reasonable in *Passenger Fares and Surcharges, supra,* plus the 10% increase, and that "This change in fare had the effect of placing the interstate standard one-way fares in Pullman cars and coaches on the same general level on all class I railroads of the country, namely, 3.3 and 2.2 cents per mile, respectively" (P. 386).

In *Georgia Comm.* v. *United States,* 283 U. S. 765, 769–770, the Court, in overruling the contention that no full hearing had been held because the Commission limited the section 13 hearing to the question of prejudice and discrimination and refused to consider anew the question of the reasonableness of the interstate rates, held that the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings and that no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate rates were prescribed as to require reconsideration of the issue.

In the present case, unlike the *Georgia* case, the Commission did consider anew the reasonableness of the interstate rates, and it found that conditions had not materially changed since its last preceding finding of the reasonableness of the 2.2-cent interstate coach fare. The present inter-

state fares, one-way and round-trip, the Commission said, "are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra,* plus the 10 percent increase authorized in *Ex Parte No. 148.* These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States * * *" In is concluding discussion it said that "The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in *Ex Parte No. 148* [255 I. C. C. 357] wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 percent for the duration of the war, is reasonable for general application" (R. 94).[7]

[7] The actual fares are in many instances lower than these basic fares. As explained in the last report in *Ex Parte 148,* 259 I. C. C. at p. 194, the standard or basic rate of fare is influenced by reductions in round-trip fares, by the application of direct line fares over circuitous routes, and by special reduced fares of 1.25 cents a mile maintained for furloughed and discharged personnel of the armed forces. See R. 81. The revenues per passenger-mile were 1.90, 1.87, 2.00, and 1.93 cents for 1940, 1941, 1942, and 1943, respectively (259 I. C. C. 194).

After adverting to the well-settled rule that the most helpful evidence in determining the reasonableness of rates and fares is comparison with other rates or fares for like services, the Commission concluded that "The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents." (R. 82).

This evidence and much more which appears in the record seems ample to support the Commission's ultimate finding (R. 95) that the present interstate fares in question "are just and reasonable."

Similarity of transportation conditions and undue preference and prejudice

Substantial evidence supports the findings that the conditions affecting the transportation of passengers in coaches intrastate within North Carolina and interstate to, from, and through North Carolina are substantially similar, that the interstate passengers travel in the same trains and generally in the same cars with the intrastate passengers but are forced to pay higher fares than the latter for like services, that thereby the intrastate passengers are unduly preferred and the interstate passengers are unduly prejudiced, and that this undue preference and prejudice is state-wide in scope.

It is not disputed that the basic intrastate coach fare in North Carolina of 1.65 cents per mile applied throughout the state. Hence, on all intrastate journeys within the state the coach passengers paid at this rate. Nor is it disputed that the basic fare for interstate journeys in southern territory was contemporaneously 2.2 cents a mile. Hence, all interstate passengers from points in North Carolina to points in other states, from points in other states to points in North Carolina, from another state to another through North Carolina, and between points in North Carolina, paid at the rate of 2.2 cents a mile.[8]

Numerous illustrations of this difference in fares were given.[9] One, which is typical, shows that an interstate passenger from Gastonia, N. C., to Atlanta, Ga., 238 miles, would pay a fare of $5.24; while a passenger travelling wholly in North Carolina from Gastonia to Goldsboro, 245 miles, would pay $3.90 or $1.34 less than the interstate passenger for practically the same distance (R. 172).

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[8] Interstate passengers between points within the state are those destined to points in other states or from points in other states to points in North Carolina between which no through fare is in effect and the applicable fare is a combination to and from some intermediate point in North Carolina.

[9] See testimony of Barry (R. 175), Lynch (R. 184–189), Makinson (R. 235–243), and Beuchler (R. 180–184), and their exhibits 3, 4, 7, 8, and 13 (R. 309, 312, 314, 383). It was testified that such examples could be multiplied indefinitely (R. 175).

There is nothing in the physical operating conditions in North Carolina as compared with those in the surrounding states of Virginia, South Carolina, Georgia, and Tennessee which would warrant this difference in fares, for the physical operating conditions in North Carolina are substantially the same as those in the adjoining states. Indeed, such conditions by and large are substantially uniform throughout southern territory. This is true also as to other conditions affecting passenger transportation (R. 161, 173, 176).

Nor was this difference in fare justified by differences in the service accorded, for the evidence shows that the interstate and intrastate passengers were transported on the same trains and were accorded similar service. A brief portion of this evidence is here stated.

The Southern Railway System, 7,200 miles, operates in the District of Columbia, and in nine southern states, including 1,202 miles in North Carolina (R. 152). Its line from Washington to Atlanta and beyond extends across North Carolina. On this line it operates 16 trains daily (8 in each direction). Some of these are through trains, which make only a limited number of stops, but each makes at least six stops in North Carolina, usually at Greensboro, High Point, Spencer, Salisbury, Charlotte, and Gastonia. Others are local trains that stop at every station. All these

trains carry interstate passengers, e. g., from Washington to Charlotte or Atlanta, or from Danville, Va., to Spartanburg, S. C., and also North Carolina intrastate passengers, e. g., in the case of a through train, from Greensboro to Gastonia, or, in the case of a local, between any two points in North Carolina. The Southern operates numerous other trains through and in North Carolina over its various lines. In some instances these trains cross state lines, as, for example, the trains between Spartanburg, S. C., and Asheville, N. C.; in other instances the run is wholly within North Carolina, e. g., the train between Winston-Salem and Wilkesboro, but in either event they carry both interstate and intrastate passengers (R. 155, 156, 161, 174).

In the operation of trains into, out of, across, and within North Carolina, the Southern gives no consideration to state lines. On none of its trains is any distinction made between interstate and intrastate passengers. Both classes of passengers travel in the same cars and coaches, baggage is handled in the same baggage car, and the trains are operated by the same crews, irrespective of the interstate or intrastate nature of the passenger travel, and all trains are operated under the same general supervision (R. 154–155). The Southern does not operate any trains whatever in North Carolina solely for intrastate passengers. Within the knowledge of the Southern's

general superintendent of transportation, who has had 35 years' experience with the Southern; there is no instance of a wholly intrastate passenger train operation on the system in North Carolina (R. 155).

This is true of the lines of other rail carriers operating in North Carolina. In the long experience of this general officer he has frequently been in contact with the operating officials of other roads and his knowledge is sufficient for him to say that there is a similar commingling of interstate and intrastate passengers on the trains of other roads in North Carolina (R. 157). Another general official of the Southern (Barry) testified that no distinction whatever is made in the handling of interstate and North Carolina intrastate passengers (R. 173).

This comprehensive testimony, which was not controverted, was suplemented by numerous examples of interstate and North Carolina intrastate passengers traveling on the same train and one paying a higher fare than the other for similar accommodations. Of the many, one relates to train No. 9 of the Seaboard Air Line Railway. The Seaboard operates 4,184 miles of road in Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, 630 of which are in North Carolina (R. 236). Its line from Richmond, Va., to Florida, traverses North Carolina, passing through Henderson, Raleigh, and Hamlet, N. C.

Another line extends from Hamlet to Atlanta and Birmingham. Train No. 9, operating from Richmond to Birmingham, carries interstate passengers, e. g., from Henderson, N. C., to Chester, S. C., and also intrastate passengers, e. g., from Henderson to Monroe, N. C. The intrastate fare from Henderson to Monroe, 193 miles, at 1.65 cents a mile, is $3.25; the interstate fare from Henderson to Chester, S. C., 238 miles, at 2.2 cents a mile, is $5.28. The interstate and intrastate passengers travel on the same train and are furnished the same accommodations. The interstate passenger pays $4.29 for that portion of his journey between Henderson and Monroe; the intrastate passenger between those points pays $3.25, a difference of $1.04 in his favor for the same distance (R. 238; Ex. 13, R. 383).

Other evidence shows similar instances on the Atlantic Coast Line. This line, 5,000 miles long, operates in Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, with 1,000 miles in North Carolina (R. 184). Its main line extends from Richmond, Va., to points in Florida (R. 185). Its trains 80 and 89 between Richmond and Florence, S. C., carry interstate passengers, e. g., from Virginia to North Carolina, and also intrastate passengers between points in North Carolina. An interstate passenger from Fayetteville, N. C., to Florence, S. C., 82.8 miles, pays a fare of $1.83, at 2.2 cents a mile. An intrastate

passenger on either of the same trains from Weldon, N. C., to Smithfield, N. C., 82.8 miles—precisely the same distance as from Fayetteville, N. C., to Florence, S. C.—at 1.65 cents a mile, would pay $1.45 (R. 188, 314).

This evidence seems ample to sustain the Commission's finding of the state-wide character of the preference and prejudice. In weighing it the Commission could properly ascribe significance to the total absence of evidence to the contrary by the local authorities, and to the admission by State Commissioner Hunter that it is generally true that interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254).

Appellants, not disputing the state-wide character of the preference and prejudice, attempted to justify the difference in fares by evidence showing inferior service on certain main-line and branch-line local trains in the state and comparing the equipment and service on those trains with that afforded by certain through streamlined trains (R. 258-279). Examples were given of overcrowding and untidiness of the coaches on the local trains. But whatever the character of the service on the latter trains, the evidence shows it was accorded to interstate and intrastate passengers alike (R. 269, 278, 400). "Admittedly," the Commission stated in its report; "interstate as well as intrastate passengers may and do travel

on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers" (R. 91).

Three of the railroads serving North Carolina, the Southern, the Seaboard, and the Atlantic Coast Line operate a limited number of modern streamlined air-conditioned coach trains.[10] On these trains seats are reserved without charge in addition to the regular coach fare (R. 178, 289). The facilities and service of these trains are available to North Carolina intrastate passengers as well as interstate passengers to or from North Carolina or passing through North Carolina (R. 303, 267). The interstate passengers on these trains pay a fare of 2.2 cents a mile. On the same trains the intrastate passengers between points in North Carolina paid 1.65 cents (R. 303). The "Southerner" (Nos. 47 and 48) makes regu-

[10] The operation of these trains is a matter of common knowledge. The Southern Railway's "Southerner" operates from New York to New Orleans. The Atlantic Coast Line's "Champion" and the Seaboard's "Silver Meteor" each operate in two sections, one to the east coast, the other to the west coast, of Florida. The "Tennessean" of the Southern Ry., from Washington to Memphis, via Lynchburg, Bristol, and Chattanooga, carrying streamlined reserved-seat coaches and also Pullman sleeping cars, does not pass through any portion of North Carolina. The Southern's "Crescent Limited" between New York and New Orleans, is not a streamliner; it is an all-Pullman train between Washington and Atlanta.

lar scheduled stops at Greensboro, High Point, Spencer, Salisbury, Charlotte and Gastonia.[11] It picks up passengers at any of these six points in North Carolina and lets them off at any of the other points (R. 177). The Southern reserves seats on these trains for intrastate passengers between any of these North Carolina points (R. 176-177). There was no proof of a restriction against the use of these streamlined coach trains by North Carolina intrastate passengers. The record shows affirmatively that they are available to those passengers to the same extent that they are available to interstate passengers, subject to the condition that seats must be reserved in advance (R. 289-290), and to the limitation that they stop at only the larger stations (R. 90).

As well stated by Circuit Judge Parker, "intrastate passenger travel on the streamlined trains and interstate passengers travel on the branch lines. The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations." (Opinion below, R. 567-8.)

The evidence, comprehensive and typical in character, was ample to support the Commission's

[11] These two trains, one in each direction daily, are included in the 16 Southern Ry. trains referred to above as operating between Washington and southern points.

finding of similarity of interstate and intrastate transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers on all trains operated in North Carolina. Cf. *Georgia Comm.* v. *United States,* 283 U. S. 765, 774; *New England Divisions Case,* 261 U. S. 184, 197–199; *United States* v. *Louisiana,* 290 U. S. 70, 75, 76.

If, however, notwithstanding the uncontroverted evidence of the state-wide character of the undue preference and prejudice and the Commission's finding to that effect, it should develop that there are isolated intrastate fares which are not related to interstate fares in such a way as to violate section 13 (4), the saving clause in the Commission's report would then come into play. This clause (R. 96) provides that the findings are "without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act." (Cf. *Wisconsin R. Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563, 591; *Georgia Comm.* v. *United States,* 283 U. S. 765, 772.)

Unjust discrimination against interstate commerce resulting from revenue losses

As stated in the Commission's report, evidence was submitted of audits made for various periods

by the principal respondents in each of the four proceedings which indicated that the amount of additional revenue which the respondents would have received during those periods had the intrastate fares been upon the interstate level exceeded $558,000 per annum in North Carolina, and $750,000 per annum in Alabama, $526,000 per annum in Kentucky, and $556,000 in Tennessee (R. 86). The evidence in this regard as to North Carolina will be found in the testimony of the general statistician of the Southern Railway (R. 202) and his Exhibit No. 9 (R. 317). Responsible officials of the respondents expressed the view that an increase in the intrastate fares to the interstate level under existing conditions would not result in any important loss of traffic to other forms of transportation and would produce increased revenues substantially equivalent to those estimated by them (R. 87, 170–171). There is little doubt that the evidence supports the finding that the revenue losses due to the lower intrastate fares would be at least $525,000 in North Carolina.

The evidence further indicated that the intrastate fares could be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic (R. 86, 172–173; 185–187; 238–240, 301, 306–308, 313, 383). Passengers destined to points outside the State could purchase intrastate tickets to points near the State line and either rebuy tickets or pay cash fare on the train for the remainder of the journey (R.

86). Of the many concrete examples given, the following is typical. The interstate coach fare between Raleigh, N. C., and Knoxville, Tenn., over the Southern is \$8.91; the intrastate coach fare from Raleigh to Hot Springs, N. C., is \$5.25, and that from Hot Springs to Knoxville is \$2.05. By purchasing an intrastate ticket from Raleigh to Hot Springs and either purchasing a ticket at Hot Springs or paying cash for the remainder of the journey, a passenger traveling from Raleigh to Knoxville could thus save \$1.61 (R. 86, 306).

The losses resulting from resort to this device were not computed separately and are included in the loss of \$525,000 per annum which the Commission found would result from the continued maintenance of the 1.65-cent intrastate fare in North Carolina.[12]

The evidence of record, some of which has been related above, amply supports the Commission's ultimate findings and in turn gives full

[12] In *New York* v. *United States*, 257 U. S. 591, 599, the opinion by Chief Justice Taft noticed that "There was evidence * * * to show that at Buffalo and other border points the difference between the interstate and intrastate fares would divert business from the interstate lines between New York City and Buffalo to the New York Central Lines [which lines between these points were wholly within the State] and that the same difference would break up interstate journeys to the west into intrastate journeys to Buffalo from New York and an interstate journey beyond, thus reducing interstate travel and discriminating against passengers carried therein."

support to the concluding finding of the existence, State-wide in scope, of both types of discrimination forbidden by section 13.

The contention that the findings are not supported by substantial evidence seems but to invite the Court to weigh the evidence, resolve such conflicts as appear in it in favor of the appellants, and reach a judgment upon it contrary to the Commission's. But, as held many times, conflicts in the testimony, the credibility of witnesses, and the weight of the evidence are for the administrative body. *Warehouse Co.* v. *United States*, 283 U. S. 501, 508; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–597; *Board of Trade* v. *United States*, 314 U. S. 534, 546; *Florida* v. *United States*, 292 U. S. 1, 12.

The Commission did not err in considering past deficits from passenger traffic

In its report in the present case the Commission observed it had found in the report on further hearing in *Ex Parte 148*, 155 I. C. C. 357 (April 6, 1943) that passenger traffic had failed for many years to pay its proper share of railway expenses, and that only with a large volume of passenger traffic was the 1942 passenger deficit currently eliminated as to most of the railroads; and that the respondents in the present case had presented statistics of their revenues, expenses,

and income, together with other data designed to support that finding as to them (R. 75).

These statistics show that each of six respondents—the Louisville & Nashville, the Atlantic Coast Line, the Clinchfield, the Norfolk Southern, the Seaboard, and the Southern—sustained substantial deficits in their passenger business for each of the six years 1936–1941 [13] (R. 76). It was not until after the increased fares and increased passenger traffic of 1942 that any of these roads earned an income from this part of their business. Even then two of the roads, the Clinchfield and the Norfolk Southern, suffered passenger deficits (R. 76).[14] The aggregate passenger deficits of these roads for the years 1936–1941 were as follows (R. 318):

Year	*Deficit*
1936	$16, 426, 832
1937	16, 119, 576
1938	19, 473, 445
1939	18, 869, 064
1940	19, 363, 851
1941	8, 351, 784
Cumulative deficits 1936–1941	98, 604, 552

[13] The segregation of the figures for the passenger service was made in accordance with the formula worked out by the Commission and used on and after January 1, 1936. Separate figures for the passenger traffic are not available prior to that date. Segregated figures covering passenger service of the other respondents, which are small railroads, were not available.

[14] The North Carolina commission authorized these two roads to increase their intrastate passenger fares to the interstate level of 2.2 cents (R. 27).

For 1942 the income or deficit of each road from passenger traffic was as follows (R. 318):

Atlantic Coast Line, Income	$4, 446, 553
Clinchfield, *Deficit*	84, 999
Louisville & Nashville, Income	2, 069, 686
Norfolk Southern, *Deficit*	131, 600
Seaboard, Income	10, 654, 634
Southern, Income	9, 748, 714

The average annual passenger deficit of these roads for the seven-year period 1936–1942 was $10,272,080 (R. 318). Of this sum the deficit of the Louisville & Nashville was $4,848,548 (R. 318). This was eliminated in the calculations appearing in the Commission's report because this road has only 13 miles of track in North Carolina—a branch extending from Murphy, about 130 miles southwest of Asheville, to the Georgia State line (R. 165, 321). With the deficit of this road eliminated, the report shows the deficits of the remaining five in No. 29036 to be as follows (R. 76):

1936, deficit	$10, 997, 768
1937, deficit	10, 231, 812
1938, deficit	12, 916, 499
1939, deficit	12, 464, 628
1940, deficit	12, 548, 190
1941, deficit	3, 436, 130
1942, income	24, 630, 302
Average, deficit	5, 423, 532

Appellants, referring to these figures, contend the order should be set aside "on the ground that the Commission had no power to order increases of North Carolina intrastate coach fares in order to compensate for passenger service deficits incurred

during prior years * * *" (R. 579, 589). But the Commission did no such thing; from its report it is obvious it required the increases of the intrastate fares in order to remove discriminations found to violate section 13. The evidence showing deficits over a period of years had a bearing on the reasonableness of the interstate fares, and was entitled to be considered by the Commission along with all other relevant data bearing upon that subject. Appellants' sole reliance in this regard is the holding in *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 590, that "regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." But there is nothing in that decision which prevents the Interstate Commerce Commission, in the exercise of its authority to establish just and reasonable rates, from considering carrier revenues over a period of years. Nor is there anything in the present provisions of the Interstate Commerce Act that precludes net revenues from rising, during a period of heavy traffic, above a fair return. As shown in a subsequent chapter, the Commission is authorized to consider earnings over a period of years, and is not required to cut down

rates when, during a temporary period of heavy traffic, the revenues rise to or even above a fair return.

The evidence established that the intrastate fare, in its relation to the interstate fare found reasonable by the Commission, was unreasonably low. The allegation of the North Carolina appellants of lack of substantial evidence that the intrastate fares were unreasonably low (R. 589) puts from view the voluminous evidence bearing upon this subject as reflected in the Commission's report and summarized in part above. In a case involving discriminations in violation of section 13 growing out of a disparity between related intrastate and interstate rates, the Commission must determine, as held in *Georgia Comm.* v. *United States*, 283 U. S. 765, 770, "whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level." Here, the Commission found upon substantial evidence that the 2.2-cent interstate fare is reasonable and that the transportation conditions affecting the related intrastate and interstate fares are substantially similar. There were other findings with adequate evidentiary support covering all the essential elements of a section 13 violation. These findings established that the intrastate fare of 1.65 cents, in its relation to the reasonable interstate fare for similar service, was unreasonably low. Upon finding that it contravened the provisions of

section 13, the Commission was authorized to raise it to the reasonable interstate level. Cf. *Shreveport Case, supra,* and see in this connection *infra,* pp. 94–97. A similar objection was overruled in the opinion of Mr. Chief Justice Stone in *Illinois Comm.* v. *U. S.,* 292 U. S. 474, 483. It was there objected that there was no finding that the intrastate rates, before they were ordered increased, were less than maximum reasonable rates. In rejecting this contention the opinion stated (p. 483):

> It is plain from the nature of the inquiry that the rate level, to which both classes of traffic [intrastate and interstate] were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues * * *

Evidence that the intrastate fare was noncompensatory was not necessary. A contention that there must be evidence to establish this fact is to assert that no intrastate rate can violate section 13 (4) unless it is noncompensatory even though it causes undue prejudice or unjust discrimination

against interstate commerce. Adoption of such a principle would atrophy section 13 (4). A state rate may be above the cost of the service but yet be unduly low in its relation to comparable reasonable interstate rates and may, therefore, be found to cause the forbidden prejudice and discrimination. A finding that the intrastate rate is below the cost of the service is not essential under section 13. In *Florida* v. *United States*, 292 U. S. 1, such a showing was made in order to emphasize the aggravated character of the discrimination, but in most, if not all, other section 13 cases approved by this Court there has been no such showing. In *Louisiana* v. *United States*, 284 U. S. 125, lack of cost evidence was urged without avail. Undue prejudice and discrimination against interstate commerce is not condoned by the possibility that the intrastate rate may be compensatory. The question is, not whether it is compensatory but whether it causes the forbidden discriminations.

The Commission's report and order negative the possibility that a passenger fare of 1.65 cents is now within the zone of reasonableness. The Price Administrator suggests, brief p. 45, that the fare of 1.65 cents per mile may be within the zone of reasonableness. This suggestion overlooks that in *Passenger Fares and Surcharges, supra*, the general finding of the Commission was that coach fares of 2 cents a mile throughout the country

were reasonable. This finding was couched in the following language (214 I. C. C. 256):

> The regular passenger fare structure of respondents [all common carriers by railroad subject to the Act, see 214 I. C. C., p. 175, indisputably including lines in southern territory] is * * * unreasonable in violation of section 1 and in contravention of section 15a * * * to the extent that it exceeds * * * 2 cents per passenger mile * * * in coaches * * * without prejudice to the maintenance of lower fares in coaches * * * in any one or more of the major districts of the country * * *

The report in that proceeding refers to the fare of 1.5 cents then in effect in southern territory and makes it clear that this fare was put in experimentally to determine whether it would recapture some of the lost passenger business, and the Commission did not require that this fare be increased to the reasonable basis of 2 cents a mile, although under the report and order the southern carriers were at liberty to do so if they so desired.

Subsequently, by virtue of orders in *Ex Parte 148,* the 1.5-cent fare became 2.2 cents. In its report in the present case, the Commission said:

> Having found in *Passenger Fares and Surcharges, supra,* that 2 cents per mile was a reasonable basic coach fare for appli-

> cation on railroads generally throughout the country, including the lines of petitioners [carriers in southern territory], we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding (R. 73).

Its Finding No. 1 was that the interstate fare of 2.2 cents is just and reasonable (R. 95). Earlier in the report it found:

> The 1.5-cent fare in effect [in southern territory] from December 1, 1933, to November 14, 1937, and from January 15, 1939, to February 9, 1942, was a *subnormal* fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles (R. 74). [Italics supplied.]

Conditions have radically changed since the 1936 report in *Passenger Fares and Surcharges, supra,* and the need of maintaining a low fare in order to attract passenger traffic no longer obtains. Now, for the first time in many years, passenger traffic carried at reasonable fares is able to pay its own way. As stated in the report in the present case (R. 75), economic conditions since the report in 1936 in *Passenger Fares and Surcharges, supra,* "have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage

unnecessary travel * * *" It was not until the appearance of the large volume of passenger traffic in 1942, and until after the fares had been increased, however, that the passenger deficit was eliminated (R. 75).

In view of these changes in conditions, of the facts found in the Commission's report, and of the Commission's explicit finding that fares of 2 cents increased by 10 percent are just and reasonable, and of the Commission's order requiring these intrastate fares to be increased from 1.65 cents to 2.2 cents, there is no room to suppose that the Commission now considers a fare of 1.65 cents to be within a zone of reasonableness.

Section 13, authorizing petition by carriers, does not require complaint by individuals

Notwithstanding the presence of substantial evidence adequately supporting the Commission's findings of discriminations of both kinds forbidden by section 13 (4), appellants claim it is insufficient because of absence of testimony by individual passengers that the disparity between the state and interstate fares operated to their disadvantage or injury; and it is contended that because of this absence or of a complaint by interstate passengers the Commission was without authority to make the order. The authority conferred by section 13 (4) may be exercised whenever it is found, after full hearing, in a proceeding initiated upon the petition of the carriers concerned, that

any intrastate fare causes the prejudice or discrimination there forbidden. Section 13 (3) explicitly authorizes the filing of such petition by the carriers. No petition, complaint, or evidence by any one else is required. By these provisions, carriers subject to the Act are permitted to show that their intrastate fares, imposed by state authority, cause undue prejudice against interstate passengers, as well as unjust discrimination against interstate commerce. In this respect, section 13 is different from section 3 (1), and its purpose is different. Section 3 (1) provides protection for individuals, localities, etc., against undue prejudice practiced by the carriers, while section 13 affords a means of relief for carriers against unduly low rates or fares imposed upon them by state authority. Neither this Court nor the Commission has held that the high purpose of section 13 (4) depends upon the presence of evidence by individuals complaining of undue prejudice where the evidence actually submitted, as in the present case, plainly shows the existence of such prejudice and the resulting injury.

III

The Commission accorded the North Carolina Commission a full hearing

It is not disputed that a hearing was held for the taking of evidence at Raleigh, N. C., December 28–29, 1943 (R. 143–409), that the North

Carolina commission appeared and presented evidence (R. 247–279); that subsequently briefs were filed by the parties, including the North Carolina commission (R. 70), and that later oral argument of the issues, including argument by counsel for the North Carolina commission, was submitted at Washington before the Commission.[35] The North Carolina commission, though not denying these facts, contends that it was denied a full hearing on seven grounds (Brief, pp. 129 et seq.).

1. The first is that the Commission's order of August 1, 1942 (R. 524–5), authorizing the carriers in southern territory to increase their coach fares to 2.2 cents, as requested in their petition of July 14, 1942, was made without hearing, evidence, or report. But as stated in the order itself, no reply or protest to the carriers' petition was lodged with the Commission. No statutory provision requires a hearing upon a petition of that nature; the lack of the necessity or desirability of a hearing was indicated by the absence of protests against the proposed step. Further, as set out in the order itself, "a basic coach fare of 2 cents per mile was approved by the Commission for application prior to Ex Parte No. 148 on railroads generally throughout the

[35] An excerpt from the oral argument before the Commission displaying stipulation of counsel, appears at R. 410–411. A full transcript of the argument, and copies of the briefs before the Commission, are before the Court as original exhibits.

country, including the lines of said petitioners; that a general increase of 10 percent was authorized to be made in all passenger fares in Ex Parte No. 148, for the reasons set forth in the report therein, *supra;* and that a basic coach fare of 2.2 cents per mile is now maintained on Class I railroads generally throughout the country, with the exception of the aforesaid petitioners." Appellant's charge of arbitrariness in this respect seems groundless.

2. After the tariffs publishing the increased coach fares of 2.2 cents in southern territory had been filed with the Commission, bearing an effective date of October 1, 1942 (pursuant to the authorization of the Commission's order of August 1, 1942), the Federal Price Administrator requested the Commission to enter upon an investigation of the fares and in the meantime to suspend their operation, under section 15 (7) of the Act. The Commission declined to do so (R. 73). The North Carolina Commission contends (brief, 130) that the Commission's refusal to exercise, at the request of the Price Administrator, its discretionary power in this regard, without hearing, evidence, or report was arbitrary. Section 15, par. 7 (reproduced on pp. 196–197 of North Carolina's brief) does not require or contemplate hearings on the question whether the suspension power shall be exercised. After the filing of the protest, the carriers are

usually given an opportunity to reply, and the Commission then determines whether the facts and circumstances justify a suspension. The short time available for the determination does not permit of formal hearings. As the statute leaves the question of suspension to the Commission's discretion, and does not contemplate a formal hearing for the taking of evidence on the question, the Commission's refusal to suspend the schedules referred to, without such a hearing, was not arbitrary.

3. The third count is that on October 11, 1943—two days prior to the institution of this proceeding on October 13, 1943—the Commission denied a petition (R. 384–387) filed July 8, 1943, by the North Carolina commission requesting the institution of an investigation, upon the Commission's own motion, into the reasonableness of the interstate coach fares of 2.2 cents in southern territory. But, as shown above, pp. 42–45, the Commission had recently conducted three general investigations into the reasonableness of passenger fares throughout the country and had found coach fares of 2.2 cents to be reasonable and lawful for general application. *Passenger Fares and Surcharges, supra* (1936), *Ex Parte 148,* 248 I. C. C. 545 (1942), and on rehearing, 255 I. C. C. 357 (1943). For these reasons the Commission saw no necessity of undertaking a further general investigation into the reasonable-

ness of the passenger fares in the South. The appellants' contention here is not that the Commission exceeded its discretion in refusing to do so, but that the refusal operated to deprive it of a full hearing in the subsequently instituted section 13 proceeding. It seems obvious it could not have had that effect.

4. This point brings before this Court an alleged error, not of the Commission, but of the Commission's examiner. It is claimed that a ruling by the examiner precluded the production by the State commission of evidence bearing on the reasonableness of the interstate coach fares. Counsel for the State commission inquired, before the taking of evidence began, whether his understanding was correct that the reasonableness of the interstate coach fares was not in issue (R. 150). The examiner responded—"Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and they [their] position on that particular question" (R. 150). This was merely a preliminary statement by the examiner of his understanding. It was not a ruling upon the proffer of any evidence by the State commission. Even if it had been a definite

adverse ruling upon the proffer of specific evidence, it would not have been final and would not necessarily have precluded the receipt of the evidence. For, in case of an alleged error by an examiner in rejecting proffered evidence, the proper procedure of course is to apply to the Commission for the issuance of appropriate instructions to the examiner. No such action was taken by the North Carolina commission, and it is not shown that it complained to the Commission at any later stage of the proceeding because of the examiner's statement. It made no protest at the time (R. 150). Nor is it shown that any specific evidence offered by the North Carolina commission was rejected during the course of the hearing. The latter part of the examiner's statement, that the parties were at liberty to show what facts they had bearing on the question of the reasonableness of the interstate fares and their position on that particular question, indicated that any evidence relevant to the question proffered by the State commission would be received. Thus, the contention that a ruling by the examiner deprived the State commission of a full hearing is clearly unmeritorious factually. But we think it should be rejected on the ground that no complaint was made to the Commission because of the alleged ruling and that complaint to the court for the first time, asking for review of action of the Commission's examiner rather

than that of the Commission, is not permissible. Cf. *U. S.* v. *Ill. Cent. R. Co.*, 291 U. S. 457, 465; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 311.

5. The examiner announced, at the close of the hearing, that no proposed report would be issued (R. 295). No objection to this announcement was then interposed by North Carolina counsel, nor, so far as the record shows, was objection subsequently made to the Commission. Examiner's proposed reports are often issued in proceedings before the Commission, but where there has been a hearing for the taking of evidence, submission of briefs, and oral argument, as in this case, it would not appear that the issuance of an examiner's proposed report is essential in order to comply with a statutory provision requiring a "full hearing." Many times proposed reports are waived. Here the absence of objection to the examiner's announcement that no proposed report would be issued was clearly tantamount to such a waiver. We suggest that the objection now made should be overruled on the ground that no objection was interposed at the time of the examiner's announcement and none was thereafter lodged with the Commission.

6. The sixth ground is that the examiner ruled that reply briefs would not be permitted (R. 295). No complaint was made to the Commission because of this ruling. Oral argument was subse-

quently had, in which the parties had full opportunity to reply to each other's arguments then submitted orally as well as those previously submitted in briefs.

7. Finally, it is complained that the Commission denied North Carolina's petition for further hearing. The petition was filed shortly after the taking of the testimony and made no showing of substantial changes in conditions in the meantime. Under section 17 (6) of the Interstate Commerce Act, "Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear. * * *" The Commission did not exceed its discretion in denying the petition for rehearing. *U. S.* v. *Northern Pacific Ry.*, 288 U. S. 490; *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248; *I. C. C.* v. *Jersey City*, 322 U. S. 503, 513–519.

The Commission accorded the state authorities a full hearing; their contention to the contrary seems to be without merit.

IV

The court below properly held that evidence *de novo* was not admissible

When this case came on for hearing before the court below, petitioners offered a certified copy of the evidence before the Commission and certain other documents from the Commission's record, which were received without objection. They also

offered several documents which had not been put before the Commission and of course had not been considered by the Commission. Objection was interposed by counsel for the Commission to the receipt of all such new evidence (R. 114–120). The court received these documents tentatively, subject to its further ruling, and in its opinion it ruled against their receipt, saying: "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered." (R. 572.)

This ruling is assigned as error. Decisions of this Court have established beyond peradventure that the validity of administrative orders is to be determined by the evidence before the administrative tribunal and not by evidence introduced for the first time in court. If the rule were otherwise, "the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." *U. S. v. Louis. & Nash. R. R.*, 235 U. S. 314, 321; *Louis. & Nash. R. R. v. U. S.*, 245 U. S.

463; *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 227; *Tagg Bros.* v. *U. S.*, 280 U. S. 420, 443–445; *Louisiana & Pac. Ry.* v. *U. S.*, 209 F. 244, 252. Compare *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, 362–369.

It is clearly indicated in *Florida* v. *United States*, 292 U. S. 1, that a section 13 case is not an exception to the rule. Speaking through Chief Justice Hughes, the Court said that "The authority conferred upon the Commission by section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, *supra*. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *U. S.* v. *Louisville & Nashville*

R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission [citing numerous cases]."

In excluding the proffered new evidence the court below did not err.

The evidence so excluded has been put before this Court. Some parts of it appear in the printed transcript, other parts have been omitted from printing under a stipulation of counsel which permits either side to refer to it in brief or in argument (R. 595–6), but such reference to this evidence would, of course, be futile if the Court holds that is was properly excluded by the court below. It consists of the following documents.

1. Affidavit of Frank A. Dowling, tendered in paragraph 156 of the North Carolina petition, and attached to that petition as Appendix 156.1 (R. 28), and same affidavit as amended (R. 517), introduced at the hearing before the court below (R. 117).

These affidavits contain figures taken from the annual reports submitted to the Commission by

various carriers for the years 1942 and 1943, but these reports were not introduced in evidence before the Commission. At the time of the hearing in December 1943 the annual reports for the year 1943 had not been compiled. Various exhibits containing data taken from the 1942 and earlier annual reports of the carriers concerned were introduced (cf., e. g., R. 318, 320, 321, 322), but the reports themselves were not introduced, nor were the data contained in these affidavits. Not having been introduced as evidence, these reports were not, and could not properly have been, considered by the Commission. In *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288, it was held that the Commission may not take judicial notice of data contained in the annual reports of the carriers on file with it for the purpose of using such data in the decision of a proceeding before it. The affidavits in question did not consist merely of computations from evidence before the Commission; they contained computations from the annual reports which were not in evidence by stipulation or otherwise. The affidavits themselves were not of record before the Commission; they were offered for the first time in the court below, contained facts and figures not in evidence before the Commission, and were clearly *de novo*.

2. Affidavit of Doris S. Whitnack, economist, Office of Price Administration (R. 54). This affidavit contains computations from data taken

exclusively from the annual reports of 11 southern railroads to the Commission for the year *1943.* No annual reports for 1943 were introduced in evidence at the Commission hearing and no data taken from them was introduced, as the reports for 1943 were not then in existence. Nor was there any stipulation that the Commission might consider these annual reports, when filed. This affidavit was clearly *de novo.*

3. Photostatic copies of parts of the annual reports of various southern carriers to the Commission for the year *1943.* (These documents are lodged in the Clerk's office and are not printed as part of the transcript.) This material was tendered for the first time to the court below (R. 115, 116). It was contended that these annual reports, when filed, were to be incorporated into the record by reference under stipulation of counsel entered into during the course of the argument before the Commission (R. 115). But that stipulation covered, not annual or other reports of the individual carriers to the Commission, but monthly statistical reports compiled by the Commission. (Copies of these monthly compilations were proffered below, were received without objection (R. 118), and are here as original exhibits, not printed as part of transcript.)

4. Photostatic copies of monthly reports of Analyses of Passenger Traffic for the month of December in 1937–1943 submitted to the Commis-

sion by six southern carriers (not incorporated in the transcript). These reports were not of evidence before the Commission either physically or by stipulation. There is no doubt they were *de novo*.

5. Monthly statistical reports issued by the Commission after its decision in this case (not incorporated in transcript). As indicated above, counsel for all parties stipulated at the oral argument before the Commission, that the Commission might use "the monthly reports of the Bureau of Statistics" for the purpose of the proceedings then under argument (R. 411). The Commission used such reports covering the months up to and including December 1943 in reaching its decision. It did not use subsequent reports, for, at the time of its decision, March 25, 1944, the latest of such reports then compiled was for December 1943. (See report, R. 78.) As stated above, counsel for appellants introduced in the court below certified copies of these reports up to and including December 1943, without objection (R. 118). They also proffered copies of such reports for the subsequent months of January, February, and March, 1944, which were objected to (R. 119). These reports could hardly be deemed within the scope of the stipulation; they were not considered by the Commission in reaching its decision, and were therefore clearly inadmissible under the rule excluding evidence *de novo*.

6. Copy of request made by the North Carolina commission upon the railroads for certain additional data for use in the proceeding before that Commission upon the petition of the railroads for authority to increase their intrastate coach fares to the interstate level (R. 510). Certified copy of this request, proffered in the court below, was objected to because of irrelevancy and also because it is not a part of the record of evidence before the Interstate Commerce Commission (R. 116). The order of the Interstate Commerce Commission could not be shown to be invalid by reference to such a request by the North Carolina commission; manifestly, therefore, this evidence was irrelevant. But it was excluded by the court below on the ground that it was not a part of the evidence before the Interstate Commerce Commission. It was properly excluded under the *de novo* rule.

7. Affidavits of J. S. Tassin (R. 526–529) and L. L. Oliver (R. 530–544). These affidavits were introduced in the court below by counsel for the carriers (R. 120), but were submitted for consideration only in the event that the plaintiffs' *de novo* evidence was admitted (R. 120). The latter evidence having been excluded, these affidavits, which are admittedly *de novo,* should also be considered as excluded.

V

The Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to contribute its fair share of the revenues required for maintenance of adequate and efficient transportation service, is not invalid on the alleged ground that the earnings of the carriers from all their traffic have recently risen to a level deemed by appellants to be in excess of a fair return

The Price Administrator challenges the validity of the Commission's finding that an unjust discrimination against interstate commerce had resulted from the lower intrastate fares required by the state commissions. His assignment of error (R. 587) makes no reference to the finding of undue preference of intrastate passengers and undue prejudice to interstate passengers; and his brief, in expressly disavowing attack upon that finding (p. 23), concedes want of concern on his part in undue preference and prejudice, as such, between interstate and intrastate passengers. But, under the authorities previously cited, pp. 33–38, the finding of undue preference and prejudice is sufficient, if valid, in and of itself, to support the order independently of the finding of unjust revenue discrimination. Thus, the Court may find it to be unnecessary to pass upon the Price Administrator's contentions or any of the contentions of the other appellants having relation solely to this particular finding.

The Price Administrator argues (brief, pp. 18–19) that the criterion of undue revenue dis-

crimination against interstate commerce, as established by decisions of this Court, is the sufficiency of the contribution made by the intrastate rates or fares to the revenue required by the railroads to enable them to maintain adequate and efficient transportation service; that a proper application of this criterion requires the Commission to determine (1) whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation service, (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of required revenues; that this criterion could not be satisfied by the determination made by the Commission that the interstate fares were reasonable and that the lower intrastate fares were charged for substantially the same service; that neither of these determinations is incompatible with "determinations" (made by the Price Administrator and not by the Commission) that the railroad revenues were in fact higher than actually required and that the intrastate fares did make a sufficient contribution to the revenues which in fact were required; that it is evident therefor, that the Commission did not properly apply the controlling criterion in reaching its basic fifth finding [that the carriers' revenues under the lower intrastate fares were less by the substantial amounts stated than they would be if those fares

were increased to the level of the corresponding interstate fares, and that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service" (R. 95–96)]; that the Commission could not properly have determined, on the evidence of record, that the then prevailing level of railroad revenues was no higher than that required to enable the railroads to render adequate and efficient transportation service, but, on the contrary, the level of revenues was then yielding a rate of return in excess of the rate needed to sustain such service.

The argument, according to our understanding of it, intends to assert that the aggregate revenues of the carriers from all their traffic, freight and passenger, interstate and intrastate, are, at this particular time, sufficient to enable the carriers to render adequate and efficient transportation service, and that, therefore, the failure of a particular kind of intrastate traffic to bear its fair proportionate share of the needed over-all revenues is to be condoned, and the Commission lacked power to increase the intrastate fares to the reasonable interstate level of fares for similar transportation service. The argument urges, in effect, that the controlling criterion is not whether the particular intrastate traffic is contributing its fair proportionate share of the needed over-all

revenues, but whether the aggregate of all traffic has already contributed enough for that purpose.

But in a section 13 case, the question is not whether the entire traffic of the railroads involved is earning enough, but whether the particular intrastate traffic is contributing its share. The decision in the *Wisconsin* case and other decisions of this Court make it clear that intrastate traffic is not contributing its fair share of the revenue where the corresponding interstate rates have been found by the Commission to be reasonable, where the intrastate rates are lower than such reasonable interstate rates, where the transportation conditions affecting the interstate and intrastate traffic are substantially similar, and where increase of the intrastate rates will result in increased revenues.

Under these decisions and subsequent amendments to the Interstate Commerce Act, failure of intrastate traffic to contribute its fair share of the revenues needed for maintenance of adequate and efficient transportation service may be found by the Commission to be an unjust discrimination against interstate commerce whether the general earnings of the carriers are low or, during a temporary period of extraordinary traffic volume, are above normal. "Congress in its control of its interstate commerce system," it was said in the *Wisconsin* case, "is seeking in the Transportation Act to make the system adequate to the needs of

the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work * * *"

Intrastate rates and the income from them, the Court said, must play a most important part in maintaining an adequate national railway system. This was demonstrated by the fact that 20% of the gross freight receipts of the railroads of the country were then from intrastate traffic, and 50% of the passenger receipts, the ratio of the gross intrastate revenue to the interstate revenue being a little less than one to three. "If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less."

At the time of the decision, the original section 15a (41 Stat. 456, 488), providing for a fair percentage return upon value, was still in force; and the Court, referring to that provision, said that "If the railways are to earn a fixed net percentage

of income, the lower the intrastate rates, the higher the interstate rates may have to be." It is equally true that if, as the present section 15a contemplates, the railways are to earn sufficient revenues to provide adequate and efficient railway transportation service, the lower the intrastate rates, the higher the interstate rates may have to be. And the following holding of the *Wisconsin* case is fully cogent under the present law: "The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, § 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by

directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

In *Florida* v. *United States,* 292 U. S. 1 (1934), the effect of the amendment of section 15a upon the authority of the Commission under section 13 (4) to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint, was considered, and it was held that the amendment did not disrupt the "dovetail relation" between section 15a and section 13 (4). "The authority conferred by section 13 (4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn," the Court said. "The Congress had knowledge of the construction given to section 13 (4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose."

These decisions lend no support to appellants' contention that intrastate traffic may avoid contributing its fair proportionate share of the needed over-all revenue when the general revenues have arisen above a certain level. On the con-

trary, they clearly recognize that where the intrastate traffic does not bear its fair share of the general burden, there is unevitably a discrimination against interstate commerce whether the general revenue of the carriers from all their traffic are high or low. For, to repeat the language of the *Wisconsin* case, "The effective operation of the Act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system." In *Illinois Comm. v. United States*, 292 U. S. 474, sustaining a section 13 order requiring removal of unjust revenue discrimination only, the general financial condition of the carriers involved was not considered at all; and the following expression of Mr. Chief Justice Stone (p. 485), speaking for the Court, is not restricted to times of low general revenues:

> The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate, is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried * * * under substantially the same conditions.

State traffic is not relieved of the obligation to bear its fair proportionate share of the needed revenues merely because the aggregate traffic, despite the losses from low intrastate rates, is yielding a fairly good return. If the various state commissions could refuse to bring intrastate

rates up to the reasonable interstate level or could require reductions in intrastate rates below that level, on the ground that the interstate transportation system is earning what might be deemed by the state commissions to be more than a fair return, the result might be, if Federal authority were impotent to prevent it, the reduction of the general revenues of the carriers as a whole to such an extent as to require a general increase in interstate rates or fares or to prevent a general reduction in interstate rates or fares.

In *Colorado* v. *United States*, 271 U. S. 153, sustaining a certificate of the Commission authorizing an interstate carrier to abandon the operation of an intrastate branch as to intrastate commerce, on the ground that the branch was operated at a loss and thereby cast a burden on interstate commerce, the Court said, p. 163:

> Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken

> the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates.

The Court pointed out that "The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318."

As the operation of an intrastate branch in intrastate commerce at a loss may prejudice interstate commerce by compelling the carrier to raise reasonable interstate rates or to abstain from making an appropriate reduction of such rates, so prejudice to interstate commerce may be effected by intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, and compel the carriers to raise reasonable interstate rates or to abstain from making an appropriate reduction of such rates. Compare *Texas* v. *United States*, 292 U. S. 522, 530, 531.

This Court has not held that section 13 is oper-

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ative only during times of general revenue deficiencies. Its decisions have construed the section as requiring that the intrastate traffic of the country, which constitutes an important part of the entire traffic, shall bear its fair proportionate share of the revenues needed to maintain an adequate railway system and that its fair proportionate share is that contributed by rates found by the Commission to be reasonable and sufficient to yield revenue meeting the tests of section 15a and the National Transportation Policy. Further, it is inevitable that if the state commissions were vested with power to refuse to authorize increases in intrastate rates to the level of reasonable interstate rates on the ground of lack of need of additional revenues or were empowered to reduce intrastate rates because in their opinion the general revenues from all traffic were too high, it would follow that the 48 states and not the Interstate Commerce Commission could set the revenue standard.

As previously observed, the Price Administrator challenges only the finding of unjust revenue discrimination. It is important to observe in this connection that, wholly aside from the finding of unjust revenue discrimination, an identical increase in carrier revenue would result from the finding of undue preference and prejudice as between persons. Upon finding that an intrastate rate results in either type of discrimination for-

bidden by section 13 (4), the Commission must then determine what rate or rates it shall prescribe to remove the discrimination. Removal of the discrimination is accomplished by requiring parity between the state and interstate rates. Obviously such parity can be attained by reducing the interstate rate to the level of the intrastate, or raising the intrastate to the level of the interstate, or by reducing one and raising the other to some common intermediate level. Cf. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. Should the Commission find, as here, that the interstate rate is reasonable and that the circumstances and conditions surrounding the interstate and intrastate traffic are substantially the same, then, to reduce the interstate rate would be to require a rate below a reasonable level. But, as held in the *Shreveport* case (234 U. S., at p. 355), it is clear that, "in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates."

The order of the Commission involved in the *Shreveport* case, which was prior to the enactment of section 13 (3) and (4), was made under section 3 (1). The Commission found and prescribed

reasonable interstate rates, found that the related intrastate rates were lower and caused a discrimination against interstate shippers, and entered an order requiring the carriers to remove the discrimination. The opinion of this Court, pp. 349-350, stated that manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. It was urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the carriers from further obligation to observe the intrastate rates, required by state authority, and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. In sustaining this holding, this Court said, p. 359, "In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement." The order in the present case requires, among other things, that the carriers cease and desist from practicing the undue prejudice and preference found in the

report to exist (R. 507). Under this part of the order, aside from the finding of unjust revenue discrimination, the carriers are entitled to disregard state regulations and to raise their intrastate fares to the level of the interstate fares found reasonable by the Commission, and thereby, under this part of the order alone, secure the additional revenue.

The Price Administrator's assertion (brief, p. 18) that "the railroad revenues were in fact higher than actually required" is without suport. The brief speaks of "determinations" to this effect, but there has been no such determination by the Commission. The determinations referred to appear to be those made in the Price Administrator's brief, pp. 29–36. By dubious calculations the brief reaches the conclusion that the rate of return of the carriers respondent in the four section 13 cases, before the payment of Federal income taxes, is higher than a fair return and that, "Clearly, therefore, the railroads were earning more than the revenues required by law." The fallacy of the argument lies in its assumption that the law sets "fair return" as the inexorable peak above which railway income shall never rise. It overlooks that the "fair return" method of rate making was repealed in 1933 along with the provision for recapture of excess earnings, and that the new standard leaves it to the administrative judgment of the Commission, unfettered

by rigid rules, to prescribe rates to yield sufficient revenue to enable the carriers to provide adequate and efficient railway transportation service. This new standard is by no means the same as the old "fair return" rule; on the contrary, it differs from it in highly important respects.

The Price Administrator's contentions would limit railway income, during the temporary period of heavy war traffic carried efficiently by the railroad system, to some indefinite level deemed to be a fair return, presumably 5¾%, notwithstanding previous deficits which reappeared for many years, precipitating nearly one-third of the mileage of the country into the hands of trustees in bankruptcy,[16] and in total disregard of the need of funds for railroad debt reduction, for new and modern equipment, for post-war rehabilitation and other purposes, and would restore the most objectionable feature of the old section 15a. That section, as is well known, was originally enacted in Transportation Act, 1920, as one of the many provisions looking to the development and maintenance of adequate national transportation service, *Wisconsin* case, *supra; New England Divisions Case*, 261 U. S. 184; *United States* v. *Louisiana*, 290 U. S. 70, 73–75; *Texas* v. *United States*, 292 U. S. 522, 530; *I. C. C.* v. *Jersey City*, 322 U. S.

[16] 1938 *Annual Report*, I. C. C., p. 2: "At the present time, railroad companies operating about 31% of the total mileage are in bankruptcy or receiveirship * * *"

503, 522–523; *United States v. Penna. R. Co.*, — U. S. — (Seatrain case), decided January 29, 1945. Its rule of rate making directed the Commission to adjust rates so that the carriers of the country, as a whole or in rate groups, would, under efficient management, etc., earn an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway transportation property. The Commission was authorized to determine what percentage of the aggregate value would constitute a fair return, subject to the proviso that for two years beginning March 1, 1920, it should not exceed 6%.[17] The recapture clause provided that any carrier which earned in excess of 6% should pay one-half of the excess to the Commission for the maintenance of a general railroad contingent fund and should keep the other half in a reserve fund. Cf. *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456 (1924), sustaining the constitutionality of the recapture clause.

In its annual reports to Congress for 1930, 1931, and 1932, the Commission recommended, for the reasons stated therein, that the rule of rate making be amended and the recapture clause repealed.[18]

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[17] In *Reduced Rates, 1922*, 68 I. C. C. 676, 679–683, 734, the Commission determined that on and after March 1, 1922, the fair return would be 5¾%.

[18] See pp. 86–90, 1930 report; pp. 107–110, 1931 report, and also Appendix G thereof, pp. 347–367; pp. 16–18, 1932 report.

The objection to the original rule of rate making, to use the language of the *Fifteen Percent Case 1931,* 178 I. C C. 539, 581, was that it cherished "elusive hopes that by mere changes in rates railroad earnings can be made stable regardless of business conditions." As explained in the 1931 report, p. 109, "This would mean lowering rates in times of prosperity, when traffic is heavy, and raising them in times of depression when traffic is light, directly counter to the normal trend of prices." The substitute which the Commission proposed for the rate-making rule contained "recognition of the principle that inasmuch as railroad earnings must inevitably fall below normal in times of depression, since railroad traffic reflects business conditions very closely, they may properly be permitted to rise above normal in times of prosperity."

The 1932 report emphasized that the recapture provisions as they then stood made no allowance for fluctuations in earnings. "If a carrier is fortunate enough to have excess income in any year, half of that excess is subject to recapture, regardless of the fact that it may be completely offset by deficiencies in succeeding years. This was the most serious defect in the recapture logic * * *"

It had been suggested, the Commission stated, p. 17, that the defect in the recapture theory could be cured by making the period, then a single year,

long enough to cover fairly peaks of prosperity and valleys of depression. "But who can say, under present conditions, how long such a period should be? The strongest argument in favor of retaining recapture in some form is the fact that there are a comparatively few railroads which have enjoyed extraordinary prosperity in the past and have even maintained relatively good earnings down to the present time. Aside from the fact that there is no telling how long such carriers will remain exceptions, in view of the continual change in industrial conditions and probable railroad consolidations, we doubt the wisdom of devising a recapture rule to cover such situations. There are other means of dealing with them. Nor is it at all certain that it is a bad thing for the country that some railroads should be able to earn more than ordinarily generous returns, in view of the hazards to railroad earnings which have become so clearly manifest in the light of recent events. The opportunity to earn more than ordinary profits in exceptional cases is an inducement, when such hazards exist, to investment which might not otherwise be made."

The Commission expressed the view therefore "that section 15a should be remodeled to fit the conditions which actually beset the railroad industry, instead of the theoretical conditions which were assumed when its present provisions were made law." It renewed its recommendation that

the recapture provisions should be repealed, stating that their repeal would remove one dark cloud which hung over the credit of the railroads, and that "the removal will benefit rather than harm the country." It also renewed its recommendations that the rule of rate making be superseded by a simple rule which would "make it clear that in regulating the general level of rates we shall always keep in mind and be guided by the need for producing, so far as possible, revenues which are sufficient for the maintenance of an adequate national transportation system, and also recognize the principle that the railroads may justly earn a surplus in times of prosperity to offset deficiencies in times of depression."

By Emergency Railroad Transportation Act, 1933, c. 220, 49 Stat. 211, 220, section 15a was amended to read as it now appears.[19] The recapture clause was eliminated and a simple rule of rate making substituted for the group method.[20] The new section 15a, which has remained since 1933 without further substantial amendment, clearly does not limit the carriers, either as a group or individually, to any particular return. Instead, the Commission is directed, in prescrib-

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[19] Except for a slight amendment made by Transportation Act 1940 (54 Stat. 898, 912).

[20] Cf. House Rept. No. 193, 73d Cong., 1st Sess., and Sen. Rept. No. 87, 73d Cong., 1st Sess., on S. 1580, Emergency Railroad Transportation Act, 1933; also *Florida* v. *United States*, 292 U. S. 1, 5–8.

ing rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic"; "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service"; and "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." And by the National Transportation Policy, adopted in Transportation Act, 1940 (54 Stat. 899; 49 U. S. C., preceding section 1), all the provisions of the Act are to be administered and enforced with a view to attaining, among other important objectives, the development and preservation of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense.

By these provisions the responsibility of determining the revenue needs of the interstate railway transportation system of the country has been placed by Congress upon the Commission. This responsibility must be performed in times of peace and, more imperatively, in time of war by the single body, authorized to act for the nation, unimpeded by divergent views of local authorities or even of other federal agencies not charged with similar responsibility.

The Commission has performed this duty. At the beginning of the war, following the threat of a railway strike and the granting of wage increases,

and after a general survey of transportation conditions, it authorized general increases in freight rates and an increase of 10% in passenger fares. *Ex Parte 148*, 248 I. C. C. 545. A year later, after a phenomenal expansion in the volume of traffic and a sharp rise in revenues, it suspended the freight rate increases until December 31, 1943, but allowed the passenger fare increase to stand. 255 I. C. C. 357. It found:

> We find that, under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, if their freight rates and charges be reduced by the amounts resulting from our previous authorizations of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof (255 I. C. C., 393–4).

In November, 1943, the Commission again examined the subject. It found that current carrier revenues would "meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof." It again suspended the previously authorized freight rate increases until June 30, 1944, but allowed the passenger fare increase to continue (256 I. C. C. 502).

Six months later, after another examination, and upon similar findings, it suspended the freight

rate increases until the end of 1944, but did not disturb the 10% passenger fare increase. 258 I. C. C. 455. This report and the one immediately preceding it were predicated upon consideration of current statistical data and returns to show-cause orders.

In the Fall of 1944 further extensive hearings were held in *Ex Parte 148* and voluminous additional evidence taken. On December 12, 1944, a further report was issued, 259 I. C. C. 159, in which the subject was again exhaustively considered in the light of present conditions. The National Association of Railroad and Utilities Commissioners, the Federal Price Administrator, and others urged that the suspended freight rate increases, and also the 10% increase in passenger fares, should be canceled. The carriers opposed such cancellation, and asked that the suspended freight rate increases be allowed to go back into effect. For the reasons stated in its comprehensive report, the Commission concluded that the freight rate increases should again be suspended, tentatively until the end of the year 1945, and that no change should be made in the passenger fares. The report fully explores the financial condition of the railroads, considers their past and present earnings, and forecasts, as far as present conditions permit, their revenues and revenue needs in the immediate future.

The ultimate finding as to freight rates was as follows:

> We find that, under present conditions, and, so far as we can reasonably foresee, for the period from January 1 to December 31, 1945, both inclusive, the revenues received by the railroads, if their freight rates and charges, including those on milk and cream whether transported in passenger or freight trains, are left substantially on their present level without the addition of the increases originally permitted in this proceeding, will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) of the act, and will be reasonable and just (*Ib.*, 193).

Respecting passenger fares the finding was:

> We find that no modification of our previous findings, orders, and authorizations respecting passenger fares is warranted (*Ib.*, 194).

The report also stated:

> Our duties under the national transportation policy of Congress and under the other provisions of the Interstate Commerce Act are continuous. In view of the uncertainties as to the factors that may affect the traffic and revenues of the respondents during the period of further suspension herein required, any party to these proceedings may petition us if cir-

cumstances and conditions affecting such traffic and revenues substantially change (*Ib.*, 195).

In view of these findings, made in successive reports at short intervals during the war period, in which the Commission has carefully inquired into the revenues of the carriers and has found that the present rates and fares which produce those revenues are just and reasonable and meet the standards of the Interstate Commerce Act and the National Transportation Policy, the contention of the appellants that the aggregate revenues of the carriers are excessive would seem to be wholly without merit. Indeed, it is questionable whether the contention is at all permissible in this case, as it is in the nature of a collateral attack upon the action in *Ex Parte 148*, which has not been directly challenged in judicial proceedings.

Rates of return of the carriers involved not unduly high measured by the abandoned standard of fair return under previous section 15a

In the preceding section, we have endeavored to show that the failure of intrastate traffic to bear its fair proportionate share of the required over-all revenues, caused by unduly low intrastate rates, is a discrimination against interstate commerce no less real when the general revenues are fairly good than when they are low. This section is devoted chiefly to a showing, for the information of the Court (though we do not believe it is

of legal significance in this case), that the rates of return of the carriers involved are not unduly high even when measured by the fair return determined under the previous law.

As stated in the Commission's report (R. 76), the Price Administrator "submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before Federal income taxes more than a fair return on various book investment bases computed by his witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce." After consideration of this and other evidence of record, the Commission found *inter alia* that the interstate fares are just and reasonable, that the lower intrastate fares were not contributing their fair share of the revenues necessary for adequate and efficient transportation service, and that such lower fares caused unjust discrimination against interstate commerce.

In his brief before this Court the Price Administrator relies upon the evidence referred to (R. 282–284 and Exhibit No. 20, R. 408A) in support of his contention that the rates of return are excessive. The exhibit considers only the recent period of 12 months ending with October 1943. (At the time of the hearing in December 1943 the latest available statistical reports were for Octo-

ber 1943.) The exhibit purported to calculate rates of return during this period for seven of the carriers serving North Carolina: Atlantic Coast Line; Clinchfield; Louisville & Nashville; Norfolk & Western; Norfolk Southern; Seaboard Air Line; Southern. Three different methods were used, in each of which the rate of return was ascertained by computing the relation of "net railway operating income *before* Federal income taxes" to various figures purporting to reflect the carriers' investment in transportation property as of December 31, 1942. The basic figures were taken from the carriers' annual and monthly reports to the Commission, but the reports themselves were not introduced. The forms of these reports were prescribed by the Commission, and they call for the use of figures appearing in the carriers' accounts, which accounts are required to be kept in accordance with the uniform system of accounts prescribed by the Commission. Neither the accounts nor the reports call for computation of "net railway operating income before Federal income taxes." Schedule 300, I of the annual report form, "Income Account for the Year," requires that "Net railway operating income" shall be computed by deducting from gross railway operating revenues first, railway operating expenses, then railway tax accruals, including all Federal income taxes, and then adding or sub-

tracting the net income or deficit from equipment rents and joint-facility rents. The exhibit computed "net railway operating income before Federal income taxes" by adding Federal income taxes to the net railway operating income, and it reaches results that are plainly erroneous. It shows, for instance, a rate of return for the Clinchfield, figured one way, as 70.5%, and, figured in other ways, as 45.5% and 8.2%. It overlooked the fact that the Clinchfield is under lease to and is operated jointly by the Louisville & Nashville and the Atlantic Coast Line.[21] The return of 8.2% was based on an investment of nearly \$69 million. The return of 70.5% was based upon an investment of \$3 million. The \$69 million is the lessor's investment in its line of railroad, 308 miles (R. 321), and the \$3 million is merely the investment of the lessees in equipment used on the line.

With the erroneous figure of 70.5% for the Clinchfield entering into the computations, the exhibit arrived at an average rate of return for the seven roads of 18.3%, before Federal income taxes. Using the returns of 8.2% and 45.5% for the Clinchfield, which appear also to be erroneous, the average rates of return before Federal income taxes, were shown as 14.7% and 18%. The exhibit failed to show the amounts of the Federal income taxes paid by the several roads.

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[21] This lease was approved in *Clinchfield Railway Lease*, 90 I. C. C. 113 (1924), subject to certain conditions sustained in *Atlantic Coast Line R. Co.* v. *United States*, 284 U. S. 288.

Other evidence shows, however, that the taxes paid by the Class I railways in the Southern Region averaged $49,488,617 annually during the period 1921–1942; that these taxes rose from $37 million in 1936 to $76 million in 1941 and to $194 million in 1942 (R. 319). For the 11 respondent carriers, taxes were $21 million in 1936 and $126 million in 1942 (R. 330).

Whether Federal income or excess profits taxes should be deducted from operating expenses in computing rates of return might be deemed an open question, and where it is appropriately presented (as in a confiscation case) it might be an important one. Cf. *Galveston Elec. Co.* v. *City of Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co.* v. *Railroad Com. of Georgia*, 262 U. S. 625. It does not appear to be necessary to determine the question in this case. It may be observed, however, that determination of the true rate of return requires consideration of what is left after the taxes are paid. This is illustrated by the figure given in the exhibit as the "Net railway operating income before Federal income taxes" for the Atlantic Coast Line, viz, $61,336,000. The "Net railway operating income" of the Atlantic Coast Line in 1943 was $15,705,000.[22] The difference between this figure and $61,336,000 indicates

[22] Shown in *Statement No. 150* of the Commission's Bureau of Transport Economics and Statistics for December 1943 (part of the record before the Com. by stipulation, R. 441, and before this Court as an original exhibit).

roughly the amount of the Federal income tax—about $45 million. The rates of return of this carrier are given in the exhibit as 19.1%, 22.1%, and 22.2%, before Federal income taxes, whereas the rate after the payment of these taxes, i. e., the relation of the actual net railway operating income in 1943, $15,705,000, to the depreciated net book investment plus cash, materials, and supplies, $276,405,000, as shown in Column 6 of the exhibit is 5.67%.[23]

In *Reduced Rates, 1922,* 68 I. C. C. 676, at p. 683, in which the Commission fixed the fair return under the original section 15a at 5¾%, it said:

> Under our system of accounts all charges to the account "railway tax accruals" are deducted from railway operating revenues before arriving at railway operating income, and all State and Federal taxes, income or other, relating to carriers' railway property, operations, and privileges, are charged to that account. This method of accounting was recently sanctioned by the Supreme Court of the United States in *Galveston Electric Co.* v. *City of Galveston, supra.* As indicated by the Court, the net income under this accounting procedure is to the stockholder a tax-exempt income,

[23] "Net railway operating income" is not, of course, the carrier's net income or profit, even though it represents an amount left after payment of railway operating expenses and railway tax accruals, for, out of it the carrier must pay interest on its funded debt and other fixed charges.

and this fact should be considered in determining what return shall be deemed fair.

The railway operating income, increased or diminished, as the case may be, by the credit or debit balances in the accounts known as equipment rents and joint-facility rents, becomes net railway operating income, the amount of which is less than it otherwise would be by the amount of income tax accrued or paid. The term "net railway operating income" is defined in paragraph (1) of section 15a. Under paragraph (3), above quoted, rates are to be so adjusted that carriers as a whole or in designated rate groups will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return. If this were realized in any instance the carrier would receive that return over and above all taxes, including the Federal tax on income, and if the fair return as determined and made public by us were 6 percent the carrier would hold that return "tax free" in the sense that after payment of its income tax it would still have left the 6 percent.

Railway corporations, like all others, are subject to income taxes which, since January 1, 1922, amount to 12.5 percent on their net income less deductions computed as provided in the income tax law, 42 Stat. L., 277. In our view railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the

public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax. We may observe that a fair return of 5.75 per cent, representing an aggregate annual net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent, out of which the Federal income tax was payable.

It will be noted that the Commission there considered "fair return" both before and after Federal income taxes and concluded that a fair return after Federal income taxes would be 5.75%.

As the Price Administrator's exhibit failed to show the amounts of Federal income taxes paid and there is no other evidence of record showing Federal income tax accruals for the odd period of 12 months ending with October 1943, we are unable to show from the record what the rates of return would have been for this period *after* Federal income taxes. The record indicates, however, that the rates of return for 1943, after Federal income taxes, when expressed in terms of the relation of net railway operating income to book investment, as exemplified by the figures for the Atlantic Coast Line given above, were not far from the fair rate of return, after Federal income taxes, of 5.75%, fixed by the Commission in 1922 under section 15a as it then stood. It is hardly

necessary to say that 5.75% is not now a statutory standard rate of return, as the Commission's determination of fair return fell into the discard upon the repeal of the original section 15a.

Evidence of record shows the rates of return after Federal income taxes for the carriers in the southern region and for 11 North Carolina respondents, for the 22-year period 1921–1942 (1942 being the last full year prior to the hearing). This evidence was embraced in an exhibit (R. 319–320) submitted by the respondents, showing, for the carriers in the Southern Region as a group, investment in railway property used in transportation service, operating revenues, operating expenses, taxes, net railway operating income, rate of return, and net income (R. 319). The exhibit shows the average rate of return (percentage which "net railway operating income" bears to undepreciated "investment in railway property used in transportation service") for the 10 years 1921–1930 as 4.2%; for the 12 years 1931–1942, 2.48%, and for the 22 years 1921–1942, 3.23%. In the "net income," i. e., net railway operating income plus other income minus interest on funded debt and other fixed charges, etc., it shows deficits as follows (R. 319):

Year	*Deficit*
1931	$22,563,485
1932	48,626,465
1933	16,048,078
1934	19,228,469
1935	24,736,251
1938	9,734,450

The exhibit further shows the rate of return of the same carriers for 1942 as 6.41%, for 1941 as 4.24%, and that the latter figure was higher than for any previous year subsequent to 1926.

For 11 of the 12 respondent carriers serving North Carolina,[24] the exhibit (R. 320) shows average rates of return for the 22-year period 1921–1942 as follows:

Road	*Rate of Return Percent*
Aberdeen & Rockfish	5.12
Atlantic & East Carolina	2.27
Atlantic Coast Line	3.10
Carolina & Northwestern	3.32
Clinchfield	3.94
Danville & Western	3.99
Louisville & Nashville	3.77
Norfolk Southern	2.26
Seaboard Air Line	2.42
Southern	3.74
Winston-Salem Southbound	3.24
Average	3.41

(The above figures embrace all transportation of the carriers concerned, freight and passenger, interstate and intrastate, and include the additional revenues resulting from the freight-rate and passenger-fare increases which became effec-

[24] The twelfth, Carolina & Tennessee Southern Ry. Co., a short line in western North Carolina, was abandoned on August 15, 1943, under the authorization of the Commission, 254 I. C. C. 828, because the entire length of its line was to be inundated by TVA (R. 318).

tive early in 1942 under the original authorization in *Ex Parte 148.* The figures showing deficits in the passenger service have previously been given, *supra,* pp. 59–61.)

VI

The Commission, in finding that the low intrastate fares operated unjustly to discriminate against interstate commerce, did not fail to give full consideraton to wartime conditions and the stabilization legislation

Price Administrator contends in his one assignment of error (R. 587) and in his brief (pp. 57–68) that the Commission, in finding unjust revenue discrimination, failed to "give full effect to wartime conditions and the stabilization legislation." In *I. C. C.* v. *Jersey City,* 322 U. S. 503, from which these words are quoted, this Court agreed with the statement of the District Court that the "Commission here is under a distinct duty in this particular case, to give full effect to wartime conditions and the stabilization legislation." "But that does not answer the real question," this Court said, "which is what is the effect of the stabilization legislation. In seeking this answer we are inquiring as to the relative powers and responsibilities of two federal agencies. Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. Commerce Commission authorization of rate increases

could have been subjected to review or veto so far as any objection of the Commission is concerned.

"But Congress did no such thing. The legislative history of relevant provisions of the Act was reviewed in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144. It was there pointed out that Congress rejected a proposal that such rates should not be increased without consent of the President. On the other hand it was assured by executive representatives that rate advances already subject to scrutiny on behalf of the public and to proof of reasonableness were not the source of the more substantial inflationary threats. Congress then adopted the provision we earlier quoted."

The provision earlier quoted, from the Inflation Control Act of 1942, is the proviso to section 1 that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such other agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase." (As stated in the Commission's report in this case (R. 92), the requirements of this proviso were complied with in each of the four section 13 proceedings.)

The decision in *I. C. C.* v. *Jersey City,* at pp.

522–523, also makes it clear that *the weight to be given to Price Administrator's contentions is for the Commission, not the court, to determine.* In so holding, the Court used this language:

> The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from rising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganization, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent * * * What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to

the Price Administrator's contentions was for the Commission, not the court, to determine. The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the Company. Cf. *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98. If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.

As in *I. C. C.* v. *Jersey City*, no charge that the Commission ignored the Administrator's contentions can fairly be made here. His main contentions, as stated in the report (R. 91) were (a) that the proposed increase in the intrastate fares would be inconsistent with the wartime stabilization program, (b) that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if the Commission should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares. These contentions were overruled by the Commission's ultimate findings. It seems obvious, too, that to have followed the suggestion to remove the discrimination by reducing the inter-

state fares to, from, and through North Carolina to 1.65 cents would have inevitably resulted in the lowering to that level of all other fares in the South, both interstate and intrastate, and thus to have established the fares generally throughout that territory on a basis which the Commission found to be "subnormal" (R. 74).

Respecting the first contention, to the effect that to raise the subnormal intrastate fare of 1.65 cents to the 2.2-cent level prevailing interstate throughout the country and intrastate in 44 of the 48 States, in order to remove undue prejudice and unjust discrimination against interstate commerce, would be inconsistent with the wartime stabilization program: The Commission cited its report in *Increases in Texas Rates, Fares, and Charges,* 253 I. C. C. 723 (Dec. 1942) which dealt with a similar situation.[25] The Texas regulatory body had refused to permit increases in intrastate freight rates and passenger fares corresponding to those authorized on interstate traffic in the original report in *Ex Parte 148.* Section 13 proceedings were instituted, in which the Price Administrator, as here, intervened and actively opposed any increases in the intrastate rates or fares (253 I. C. C., 733). The Commission was thus confronted, for the first time, with the question of the effect of the anti-inflation leg-

[25] See reference to this report in *I. C. C.* v. *Jersey City,* 322 U. S., footnote 8, pp. 520–521.

islation upon a section 13 case involving alleged undue prejudice and unjust discrimination against interstate commerce resulting from a disparity between interstate rates, previously found reasonable, and intrastate rates controlled by State authority. After review and consideration of the provisions of the Emergency Price Control Act of 1942, and the amendments of the Stabilization Act of October 2, 1942, the Commission reached the conclusion that those acts made no direct changes in, or additions to, the administrative provisions of the Interstate Commerce Act relative to transportation rates and charges, except the requirements as to notice to and intervention by the designated Federal agency (*Ib.*, 733-4). This holding was subsequently sustained by this Court in *I. C. C.* v. *Jersey City, supra.*

The Commission agreed, however, with the contention of the Price Administrator that, under the Emergency Price Control Act, as amended by the Stabilization Act of October 2, 1942, the Commission, in determining the lawfulness of proposed increases in transportation charges, should consider, in addition to the factors ordinarily considered under the Interstate Commerce Act, the effect of such increases on the price control and stabilization program. In this regard the Commission stated it was not unmindful of the evil effects of inflation, and that, in its judg-

ment, the inflationary tendencies of general increases in rates constitute a factor which it may and should take into consideration in passing judgment upon such increases, citing sections 1 and 15a of the Interstate Commerce Act, the National Transportation Policy contained in section 1 of the Transportation Act, 1940, and *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197.[26] "Increases in the general price level ultimately affect the costs of rendering transportation service and the value of such service to the public. Such considerations were in fact carefully weighed and reflected in the increases which we authorized under Ex Parte No. 148. These increases were graded from nothing at all through 3 percent and 6 percent on freight to 10 percent on passenger traffic" (*Ib.*, 733–4).

The Commission pointed out that the increases sought on Texas traffic were part of a general increase proposed by the carriers on all interstate and intrastate traffic; that the carriers sought merely to apply increases on intrastate traffic in Texas similar to those which it had authorized on interstate traffic throughout the country, including that to, from, and through Texas. The Commission found and concluded that the intra-

[26] In that case, at p. 219, the Court said:

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress."

state rates and fares involved resulted in both types of discrimination forbidden by section 13 and ordered these discriminations removed by increases in the intrastate charges to the level of the interstate charges as modified by the *Ex Parte 148* increases, which were found to be just and reasonable.

The conclusions so reached in the *Texas* case were reaffirmed in the subsequently issued report on further hearing in *Ex Parte 148*, 255 I. C. C. 357, 392–393. The Price Administrator there contended that the Emergency Price Control and Stabilization Acts modify or amend the provisions of the Interstate Commerce Act, and that, in the determination of a reasonable level of rates and fares, the Commission must be controlled by the provisions of the Price Control and Stabilization Acts and administrative action thereunder. It was his position that the "adequate transportation" provisions of the Interstate Commerce Act are superseded by the "anti-inflation" provisions of the Stabilization Act, and that "all regulatory standards must yield to the dominant purpose of the Stabilization Act." The Commission was unable to agree with this view. It stated (255 I. C. C., p. 392):

> At a time when war has imposed unprecedented burdens on the railroads, and has brought them unprecedented earnings, our duty is to determine a rate structure

that will meet the requirements of the national transportation policy and the other governing provisions of the Interstate Commerce Act. We recognize the congressional obectives in the Price Control and Stabilization Acts to prevent inflation during the present emergency, and in the administration of those statutes the Director of Economic Stabilization and the Price Administrator will have our cooperation. *We are also cognizant of the vital importance of the national transport system in this crisis. Revenues from operations must be sufficient so that mere lack of money may not be the cause of impairment of the transportation system.* [Italics supplied.]

These conclusions were adhered to by the Commission in the case at bar. (R. 91.) It is significant that in its latest report in *Ex Parte 148*, 259 I. C. C. (Dec. 12, 1944), at p. 189, the Commission found that—

Nothing in the record shows that the 10 percent increase in passenger fares has had any inflationary effect.

For the above reasons we submit that the Commission, in finding that the intrastate fares involved operated unjustly to discriminate against interstate commerce, did not fail to give full consideration to wartime conditions and the stabilization legislation.

CONCLUSION

It is respectfully submitted that the decree of the court below, sustaining the Commission's order and dismissing the complaint, should be affirmed.

DANIEL W. KNOWLTON,
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Interstate Commerce Commission.

APRIL 1945.

APPENDIX

The Interstate Commerce Act, as amended (49 U. S. C.), provides:

Section 13

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commis-

sion. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Com-

mission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

The National Transportation Policy, as declared in the Transportation Act of 1940 and enacted as a part of the Interstate Commerce Act to precede Part I thereof (c. 722, 54 Stat. 898, 899; 49 U. S. C., preceding sec. 1) reads:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water,

highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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